# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 226 66.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, PETITIONER,

*vs.*

THEODORE M. KRUMSEIG AND LOUISE KRUMSEIG.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FILED MARCH 8, 1898.
CERTIORARI AND RETURN FILED MARCH 29, 1898.

(16,507.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption to transcript from United States circuit court of appeals | 1 | 1 |
| Caption to transcript | 2 | 1 |
| Transcript from district court of St. Louis county, Minnesota | 2 | 2 |
| Summons | 2 | 2 |
| Petition | 3 | 2 |
| Mortgage, Theodore M. Krumseig and wife to Missouri, Kansas and Texas Trust Co., September 5, 1890 | 3 | 2 |
| Summons and sheriff's return | 9 | 8 |
| Affidavit for publication of summons | 10 | 9 |
| Petition for removal to Federal court | 11 | 10 |
| Order of removal | 13 | 12 |
| Bond for removal | 13 | 12 |
| Clerk's certificate to transcript | 15 | 13 |
| Notice of motion to require plaintiffs to replead | 15 | 14 |
| Order denying motion to require plaintiffs to replead | 16 | 14 |
| Answer | 16 | 15 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1897.

| | Original. | Print. |
|---|---|---|
| Stipulation to make Union Trust Company a party defendant | 19 | 17 |
| Affidavit for order of service upon Union Trust Company | 20 | 17 |
| Order for service upon Union Trust Company | 21 | 18 |
| Proof of service of order upon Union Trust Company | 22 | 19 |
| Decree *pro confesso* against Union Trust Company | 23 | 20 |
| Order setting aside decree against Union Trust Company, etc. | 23 | 20 |
| Order granting leave to Missouri, Kansas and Texas Trust Co. to amend answer | 24 | 21 |
| Stipulation as to date of filing of amended answer | 24 | 21 |
| Amended answer of Missouri, Kansas and Texas Trust Co. | 25 | 22 |
| Stipulation extending time to take testimony | 27 | 24 |
| Replication | 28 | 24 |
| Order consolidating causes | 28 | 25 |
| Order: cause submitted | 29 | 25 |
| Testimony for complainants | 29 | 27 |
| Testimony of J. Henry Huntington, Jr. | 31 | 27 |
| Exhibit A—Contract between Prudential Insurance Co. and Missouri, Kansas and Texas Trust Co., February 27, 1889 | 34 | 30 |
| Testimony of Theodore M. Krumseig | 39 | 34 |
| W. H. Squier | 41 | 36 |
| William E. Covey | 44 | 38 |
| Copy of policy issued by Prudential Insurance Co. to Missouri, Kansas and Texas Trust Co. on life of Theodore M. Krumseig, September 5, 1890 | 47 | 41 |
| Application of Theodore M. Krumseig for loan, July 29, 1890 | 47 | 41 |
| Examiner's report | 49 | 42 |
| Articles of association of the Missouri, Kansas and Texas Trust Co. | 50 | 43 |
| Testimony for defendant | 54 | 46 |
| Testimony of W. H. Squier | 54 | 46 |
| W. E. Covey | 59 | 51 |
| Wendell P. Mosher | 63 | 54 |
| Stipulation for taking depositions of witnesses at Newark, New Jersey | 69 | 60 |
| Testimony of John B. Lunger | 71 | 61 |
| Stipulation for taking testimony of witnesses at Philadelphia, etc. | 75 | 65 |
| Testimony of Francis H. Hemperly | 77 | 66 |
| Stipulation for taking testimony of witnesses at Kansas City | 87 | 75 |
| Testimony of Arthur E. Stillwell | 88 | 76 |
| Robert B. Cone | 95 | 82 |
| William Shipley Taylor | 102 | 88 |
| Opinion of the court | 106 | 92 |
| Decree | 110 | 95 |
| Petition for and order allowing appeal | 111 | 96 |
| Assignment of errors | 112 | 97 |
| Bond on appeal | 113 | 97 |
| Citation and admission of service | 115 | 99 |
| Clerk's certificate to transcript | 116 | 100 |
| Appearance of counsel for appellant | 117 | 100 |
| Appearance of counsel for appellees | 117 | 101 |

| | Original. | Print. |
|---|---|---|
| Argument commenced | 118 | 101 |
| Order: cause submitted | 118 | 101 |
| Opinion of United States circuit court of appeals | 120 | 102 |
| Decree of United States circuit court of appeals | 133 | 114 |
| Order granting leave to file petition for a rehearing | 134 | 115 |
| Petition for rehearing | 135 | 116 |
| Order: denying petition for a rehearing | 139 | 118 |
| Petition for order to recall mandate | 139 | 118 |
| Order recalling mandate | 142 | 120 |
| Clerk's certificate to transcript | 144 | 121 |
| Writ of certiorari | 145 | 122 |
| Return to writ of certiorari | 146 | 122 |
| Stipulation as to return | 146 | 123 |

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the May term, 1896, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the fourth day of May, A. D. 1896, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Be it remembered that heretofore, to wit, on the nineteenth day of February, A. D. 1896, a transcript of record, in pursuance to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in a certain cause wherein the Missouri, Kansas and Texas Trust Company was appellant and Theodore M. Krumseig *et al.* were appellees, which said transcript of record is in the words and figures following, to wit:

2 United States of America, Circuit Court of the United States, District of Minnesota, Fifth Division.

Pleas in the United States circuit court, district of Minnesota, fifth division thereof, in the equity cause numbered 177 and entitled Theodore M. Krumseig and Louise Krumseig, plaintiffs, *vs.* Missouri, Kansas & Texas Trust Company, a corporation, defendant.

United States Circuit Court, District of Minnesota, Fifth Division, *ss*:

Be it remembered that on the 13th day of August, A. D. 1894, there was filed in the office of the clerk of the United States circuit court, district of Minnesota, fifth division, at Duluth, in said (district), a transcript from the district court of the eleventh judicial district, in and for the county of St. Louis and State of Minnesota by the defendants herein, which said transcript is in words and figures as follows, to wit:

*Transcript.*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

*Summons.*

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*against*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, a Corporation, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff- in the above-entitled action, which complaint has been filed in the office of the clerk of said district court, at the city of Duluth, county of St. Louis and State of Minnesota, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Duluth, in the said county of St. Louis within twenty days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff- in
3 this action will apply to the court for the relief demanded in said complaint.

Dated May 7th, A. D. 1894.

J. B. RICHARDS,
*Plaintiffs' Attorney, 304 Burrows Bldg., Duluth, Minn., Res. 522 W. 5th St.*

Filed May 17, 1894.

D. J. SINCLAIR,
*Clerk of District Court,*
By F. R. MILLAR, *Deputy.*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

*Complaint.*

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, a Corporation, Defendant.

Plaintiffs respectfully show to the court:

1. That they are the owners of and are in possession of the following-described premises, to wit: lot seven (7) of block sixty-two (62) of Portland division of Duluth, Minnesota, according to the plat thereof of record in the office of the register of deeds in and for the county of St. Louis and State of Minnesota; and plaintiffs allege

that at all the times hereinafter mentioned they were and are residents of the city of Duluth, Minnesota.

2. That defendant is a corporation organized under and by virtue of the laws of the State of Missouri and that defendant claims an interest in and a lien upon said above-described premises adverse to the interest of the plaintiffs therein and by virtue of the mortgage thereon hereinafter mentioned and described, which mortgage constitutes an incumbrance and a cloud upon the title and right of the plaintiffs in said premises whereas the plaintiffs allege the fact to be that, on their information and belief, that said mortgage is wholly illegal and void, as more fully appears from the facts hereinafter stated.

3. That at Duluth, Minnesota, on or about September 5th, 1890, the plaintiffs for the consideration hereinafter stated, made, executed and delivered to the defendant their ten (10) certain promissory notes in writing dated September 5th, 1890, each for the sum of $360.00 each payable in monthly installments of thirty ($30.00) dollars at the office of the defendant at Kansas city, Mo., commencing with the 6th day of September, 1890, and ending with September 5th, 1900, and each of the said monthly installments drawing interest at the rate of ten per cent. per annum after due; that the first forty-one (41) of the said 120 installments have been paid amounting to the sum of $1,230.00.

3½

4. That at Duluth, Minnesota, on or about September 5th, 1890, the plaintiffs made, executed and delivered to the defendant as mortgagee for the purpose of securing to the defendant the payment of the said promissory notes their certain indenture of mortgage in the words and figures as follows, viz,

"This indenture of mortgage made this 5th day of September in the year of our Lord one thousand eight hundred and ninety, by and between Theodore M. Krumseig and Louise Krumseig, his wife, of the county of St. Louis and State of Minnesota, parties of the first part and Missouri, Kansas and Texas Trust Company, a corporation, party of the second part.

Witnesseth, That the parties of the first part for and in consideration of the sum of one dollar to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part and its assigns forever all of the following described tract piece or parcel of land lying and situate in St. Louis county and State of Minnesota, to wit, lot numbered seven (7) of block numbered sixty-two (62), Portland division of Duluth as same appears upon a recorded plat on file in the office of the recorder of deeds for St. Louis county, Minnesota,

To have and to hold the same with all and singular the hereditaments and appurtenances belonging or in anywise appertaining and all the right of homestead exemption unto the party of the second part and to its successors and assigns forever. And the said parties of the first part do hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above

granted and (siezed) of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances and that they will warrant and defend the same in the quiet and peac-able possession of said party of the second part, its successors and assigns for-
4 ever against the lawful claims of all persons whomsoever. Provided, always and this instrument is made, executed and delivered on the following conditions, to wit,

First. Said parties of the first part are justly indebted to the party of the second part in the sum of thirty-six hundred ($3,600.00) dollars lawful money of the United States of America, as witnessed by ten certain promissory notes, each for the sum of three hundred and sixty dollars, payable in twelve monthly installments of thirty dollars each, on the 5th day of every month, beginning with the 5th day of September, 1890, which said notes have been executed and delivered by the said parties of the first part of even date herewith and are payable to the order of said Missouri, Kansas & Texas Trust Company at its office in Kansas City, Mo.

Second. Said parties of the first part hereby agree to pay all taxes and assessments that may be levied upon said premises when the same are due and insurance premiums for insurance to be taken out in some fire insurance company to be selected by the party of the second part, to the amount of one thousand dollars loss, if any, payable to the mortgagee or its assigns; and if said taxes and said premiums for insurance are not so paid the party of the second part or the legal holder or holders of this mortgage may without notice declare the whole sum of money hereby secured due and payable at once or may elect to pay said taxes, assessments and insurance premiums and the accounts so paid shall be a lien on the premises aforesaid and be secured by this mortgage and collected in the same manner as the principal debt hereby secured with interest thereon at the rate of ten per cent. per annum. But whether the legal holder or holders of this mortgage elect to pay such taxes, assessments or insurance premiums or not, it is distinctly understood that the legal holders hereof may immediately cause this mortgage to be foreclosed and it is further expressly agreed by and between the parties hereto that said second party and its assigns shall be entitled to collect and may demand, collect and receive all rents, issues and profits of the premises herein described and this instrument shall be construed to be a full assignment by said first parties to said second party and its assigns of said rents, issues and profits. And if suit shall be brought for the foreclosure of this mortgage or the collection of the indebtedness secured thereby or any part thereof, said parties of the (second) part agree to pay to said second party or assigns a reasonable attorney's fee to be taxed as part of the costs in said suit.

Third. Said parties of the first part agree to keep all buildings, fences and other improvements upon said premises in as
5 good condition and repair as the same are at this date and to abstain from all waste on said premises until the notes hereby secured are paid.

Fourth. Said parties of the first part hereby agree that if the

makers of said notes shall fail to pay, or cause to be paid said money according to the tenor and effect of said notes and each and every of them respectively in twelve monthly installments, that is, on the 5th day of each month after date until paid as is provided by said notes or to conform or comply with any of the foregoing conditions or agreements, the whole sum of money hereby secured at the option of the legal holder or holders thereof, become due and payable at once without notice with interest at the rate of ten per (—) per annum computed annually on said notes from the date thereof to the time when the money shall be actually paid. Provided however that all of said money shall not be due and payable until the makers of said notes shall pay or cause to be paid four consecutive installments as in said notes provided. And the said parties of the first part for said consideration do hereby expressly waive an appraisement of said real estate, and all benefit of the homestead exemption and assay laws of the State of Minnesota. It is further agreed that in the event that suit is commenced to foreclose the mortgage, the mortgagee or assigns may at any time take possession of said mortgaged premises, and in the decree of foreclosure, said mortgagee or assigns shall have an order for the immediate possession of said premises.

The foregoing conditions being performed, this conveyance to be void, otherwise of full force and virtue. And it is further understood by and between the said parties of the first part, their executors, administrators or assigns and the said party of the second part, the Missouri, Kansas & Texas Trust Company, that in case said Theodore M. Krumseig, one of the parties of the first part should die after the execution and delivery of the said notes and this mortgage, and within ten years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly installment that shall have become due prior to his death, according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years and has not without written consent of the party of the second part, visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling, or transportation of explosives or entered into the service of any railroad train, or on a steam or sailing vessel for two years.

In testimony whereof, the said parties of the first part have hereunto subscribed their names and affixed their seals the day and year above mentioned.

THEODORE M. KRUMSEIG. [SEAL.]
LOUISE KRUMSEIG. [SEAL.]

KATIE BRANDHORST.
JOHN MILOSTAN.

Executed and delivered in the presence of—
WENDELL P. MOSHER.

STATE OF MINNESOTA, }
*St. Louis County.* }

Be it remembered, that on this 5th day of September, A. D. eighteen hundred and ninety, before the undersigned a notary public in and for the said county and State, personally came Theodore M. Krumseig and Louise Krumseig, his wife, who are both personally known to me to be the same persons described in and who executed the foregoing mortgage deed, and each of them duly acknowledged the same to be their voluntary act and deed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal on the day and year above written.

[NOTARIAL SEAL.] WENDELL P. MOSHER,
*Notary Public, St. Louis Co., Minn.*"

5. That on the 5th day of September, 1890, at — p. m. said mortgage was filed for record and duly recorded in the office of the register of deeds in and for St. Louis Co. Minnesota, in Book 50 of Mortgages on page 443.

6. That the sole consideration for the notes and mortgage above described was as follows, viz, (1) the sum of nineteen hundred ($1,970.00) and seventy dollars delivered at Duluth, Minn. by defendant to said plaintiffs at date of said contract, (2) interest on said sum from the date of the said loan until the maturity of the said notes, and (3) that portion of the mortgage described as follows, viz,

"And it is further understood by and between the parties of the first part their executors, administrators or assigns and the party of the second part the Missouri, Kansas & Texas Trust Com-
7 pany, that in case the said Theodore M. Krumseig one of the said parties of the first (—), should die after the execution and delivery of said notes and this mortgage, and within ten years thereafter, each and every of said notes remaining unpaid at said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided, however, that the parties of the first part shall have promptly paid each monthly installment which shall have become due prior to his death, (accord-) to the terms of the said notes hereinbefore mentioned and that he has not committed suicide within two years, and has not, without the written consent of the party of the second part, visited the torrid zone or personally engaged in the business of blasting, mining, or submarine operations or in the manufacture, handling, or transportation of explosives, or entered into the service of railroad train or on a steam or sailing vessel for two years."

And plaintiffs allege that by said notes and mortgage there was reserved and secured by the defendant and so intended to be reserved and secured for the said loan and forbearance of the sum paid to and received by the plaintiffs, a greater sum and value than ten ($10.00) dollars on one hundred ($100.00) dollars for one year, even after the deduction of the full, ample, reasonable, ordinary and proper costs of the life-insurance part of the consideration, as more fully herein-

after described, and plaintiffs aver that the rate of interest so charged and reserved by defendant in said contract is not less than 20 per cent. per annum for the full term of the ten years, over and above, and after allowing for the full, ordinary and proper costs of life insurance on the life of said Theodore M. Krumseig, at his age at said time and for the times and on the amounts risked in said contract by the defendant, all of which facts were well known to the defendant at the time of the making of said contract.

Plaintiffs further allege that defendant is not a building and loan association or society, and that said life-insurance part of said consideration was so inserted in said contract as a mere scheme and device for the purpose of covering, disguising, and concealing usury in said contract and for no other purpose, and that the said notes and mortgages are and were wholly usurious and void.

7. Plaintiffs further allege that said contract whereby upon the death of said Theodore M. Krumseig, as provided in said contract, defendant was to deliver up the notes and cancel the said mortgage of record, was and is and was so understood and agreed by and
8 between all of the parties thereto, when made, to be a life-insurance contract on the life of said Theodore M. Krumseig, that the original application for the said loan of money hereinbefore mentioned was on one of the printed blanks of the defendant, and said application, signed by said Theodore M. Krumseig, expressly stipulated that said Theodore M. Krumseig should pass such satisfactory medical examination as should be required by defendant, and should pay to the defendant a fee of $3.00 therefor, and that said application for the loan should not be deemed accepted and approved by defendant until a satisfactory medical examination of said Theodore M. Krumseig had been had; and that thereafter the defendant required the said Theodore M. Krumseig to pass and said Krumseig did pass a medical examination and did pay the said fee of $3.00 therefor, and said examination was by said defendant submitted to the Prudential Life Insurance Company of Newark, N. J. with which company defendant had a contract to report on all of defendant's applications for loans in the said State of Minnesota, and said Prudential Company, having reported thereon, said application was thereupon duly accepted and the notes and mortgage herein described were thereupon executed and delivered to the defendant and plaintiffs allege on their information and belief, that upon favorable report as aforesaid by Prudential Life Insurance Co. on the said Theodore M. Krumseig "risk," defendant thereupon entered into a contract with said Prudential Co. whereby said Prudential Co. undertook and agreed to indemnify and save defendant harmless from all loss accruing to defendant under its said contract with the plaintiffs through the possible death of said Theodore M. Krumseig within the life of the said contract.

8. That the defendant has never complied in any manner with any of the provisions of title 6 of chapter thirty-four (34) of the General Laws of the State of Minnesota of 1878, or of any of the laws of the State of Minnesota respecting the transaction of a life insurance business by foreign corporations in the State of Minnesota,

and that thereby the said contract, embodied in said notes and mortgage, was made in violation of the laws of the State of Minnesota, and was and is, wholly illegal and void.

Wherefore, plaintiffs ask the judgment of the court:

1. That the said mortgage be cancelled of record and that defendant be declared to have no interest in said mortgaged premises by virtue thereof, and that the defendant be permanently enjoined from taking any action or proceeding for the enforcement of the same or either of them and that the said notes be cancelled and delivered up to the said plaintiffs.

9 2. For their costs and disbursements herein.

3. For such other and further relief as may seem proper and just to the court.

Dated Duluth, Minn., May 7th, 1894.

J. B. RICHARDS,
*Plaintiffs' Attorney.*

STATE OF MINNESOTA, }
*County of St. Louis.* }

Theodore M. Krumseig being first duly sworn upon oath says that he is one of the plaintiffs in the foregoing within-entitled action; that he has read the foregoing complaint; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

THEODORE M. KRUMSEIG.

Subscribed and sworn to before me this 7th day of May, 1894.

[NOTARIAL SEAL.] JOHN B. RICHARDS,
*Notary Public, St. Louis Co., Minnesota.*

Filed May 17th, 1894.

J. D. SINCLAIR,
*Clerk of District Court,*
By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

District Court, Eleventh Judicial District.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, *against* MISSOURI, KANSAS & TEXAS TRUST COMPANY, a Corporation, Defendant. } Summons.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which complaint has been filed in the office of the clerk of said district court, at the city of Duluth, county of St. Louis and State of Minnesota, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Duluth, in the said county of St. Louis

within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint.

Dated May 7th, A. D. 1894.

J. B. RICHARDS,
*Plaintiffs' Attorney, 304 Burrows B'ld'g, Duluth, Minn.*

Residence 522 W. 5th St., Duluth.

Filed May 24, 1894.

D. J. SINCLAIR,
*Clerk of District Court,*
By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, } ss:
*County of St. Louis,* }

I hereby certify and return that by virtue of the within summons I have made due and diligent search and inquiry for the within-named Missouri, Kansas & Texas Trust Company a corporation throughout the said county of St. Louis, to serve the within summons upon them, but they cannot be found therein, having no agent or officer therein upon whom service can be made.

Dated at Duluth this 23d day of May 1894.

PAUL SHARVEY,
*Sheriff, St. Louis County, Minn.,*
By IWAN HANSEN, *Deputy.*

*Sheriff's Fee.*

Return .....$1 00
Mileage.... .....

Filed May 24, 1894.

D. J. SINCLAIR,
*Clerk of the District Court,*
By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

District Court, Eleventh Judicial District.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, a Corporation, Defendant.
} Affidavit for Publication.

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

J. B. Richards being first duly sworn on his oath states that he is attorney for the plaintiff herein; that he has heretofore deliv-

ered to the sheriff of said county a summons herein for serv-
11 ice upon the defendant; and that the said sheriff has made his return thereon that he was unable to find the defendant within the said county, or any agent or officer upon whom service of said summons could be made and said summons with the said return thereon has been heretofore filed in the office of the clerk of said court; that defendant is as deponent believes a foreign corporation and is not a resident of the State of Minnesota; but is a Missouri corporation and has its office at Kansas City, Mo.; that deponent has heretofore deposited in the post-office at Duluth, Minn. postage prepaid, an envelope containing a copy of said original summons, said envelope directed to defendant at Kansas City, Mo.; and deponent further states that the subject of the said action is a certain mortgage executed by the plaintiffs as mortgagors, dated September 5th, 1890 to defendant as mortagee, covering on lot 7, of block 62, of Portland division of Duluth, Minn, in said county and State (*State*), according to the plat thereof; and the object of said action being to determine the interest which defendant claims in said premises by virtue of the said mortgage; and to discharge said mortgage from the records of said county.

Wherefore, deponent makes this affidavit for the purpose of laying foundation for obtaining service of said summons upon defendant by publication according to law.

J. B. RICHARDS.

Subscribed and sworn to before me this 2nd day of June, 1894.

[NOTARIAL SEAL.] EDWARD S. TOWNE,
*Notary Public, St. Louis County, Minn.*

Filed June 4, 1894.

D. J. SINCLAIR,
*Clerk of District Court,*
By F. R. MILLAR, *Deputy.*

*Petition for Removal of this Cause to the United States Circuit Court, Fifth Division, District of Minnesota.*

District Court, Eleventh Judicial District.

STATE OF MINNESOTA, } ss:
*St. Louis County,* }

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, }
*vs.*
MISSOURI, KANSAS & TEXAS TRUST CO., Defendant. }

To the honorable the district court of St. Louis county, eleventh judicial circuit, State of Minnesota:

Your petitioner respectfully shows that it is the defendant in the above-entitled suit, and that it is a non-resident of the
12 State in which said suit was brought, to wit, the State of Minnesota; and that the matter and amount in litigation in

dispute in said suit, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

That the said suit is of a civil nature and is brought for the purpose of having a certain mortgage described in the complaint in the above-entitled cause, cancelled of record, and that this defendant be declared to have no interest in said mortgaged premises by virtue thereof; and that this defendant be permanently enjoined from taking any action or proceeding for the enforcement of the same, and that certain notes be cancelled and delivered up to plaintiffs.

That the controversy in the said suit is wholly between citizens of different States, to wit: between your said petitioner, who avers that it was at the time of the bringing of this suit and still is a corporation organized and existing under the laws of the State of Missouri, and a citizen of said State of Missouri, and the said plaintiffs, Theodore M. Krumseig and Louise Krumseig, who, as your petitioner avers, were then and still are citizens of the State of Minnesota.

And your petitioner herewith offers a bond with good and sufficient security for its entering in said circuit court of the United States, fifth division, district of Minnesota, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to said United States circuit court, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the fifth division, district of Minnesota. And it will ever pray.

WM. C. WHITE,
*Attorney for Petitioner.*

STATE OF MISSOURI, }
*County of Jackson,* } ss:

I, J. McD. Trimble, being duly sworn, do say that I am a member of the firm of Trimble and Bradley the general attorney for the petitioner in the above-entitled cause; that I have read the
13 foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

J. McD. TRIMBLE.

Subscribed by the said J. McD. Trimble in my presence, and by him sworn to, before me, this 2d day of July, A. D. 1894.

My commission as notary expires September 23d, 1895.

[NOTARIAL SEAL.] WM. R. THURMOND,
*Notary Public in and for Jackson County, Missouri.*

In District Court, Eleventh Judicial District.

STATE OF MINNESOTA, *County of St. Louis,* } ss:

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendants.

The defendant herein having within the time provided by law filed its petition for removal of this cause to the circuit court of the United States for the fifth division, district of Minnesota, and having at the same time offered its bond in the sum of five hundred dollars, with the National Surety Company and S. F. Boyce, good and sufficient sureties; pursuant to statute and conditioned according to law; now therefore, this court does hereby *and* accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the next circuit court of the United States for the fifth division, District of Minnesota, pursuant to the statute of the United States, and that all other proceedings of this court be stayed.

Dated July 25th, 1894.

By the court:

CHAS. L. LEWIS, *Judge.*

Filed Jul- 26, 1894.

D. J. SINCLAIR,
*Clerk of District Court,*
By J. S. MOODY, *Deputy.*

Know all men by these presents that we, Missouri, Kansas & Texas Trust Company, as (princip*les*,) and National Surety Company and S. F. Boyce as sureties, are held and firmly bound unto Theodore M. Krumseig and Louise Krumseig in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Theodore M. Krumseig and Louise Krumseig, their heirs and assigns, we bind ourselves, our heirs, repre-
14 sentatives and assigns jointly and severally, firmly by these presents.

Yet, upon these conditions: That said Missouri, Kansas & Texas Trust Company having petitioned the district (co*unty*) of St. Louis county, Minnesota, being the eleventh judicial circuit of said State of Minnesota, for the removal of a certain cause therein pending, wherein the said Theodore M. Krumseig and Louise Krumseig are plaintiffs and the said Missouri, Kansas & Texas Trust Company is defendant, to the circuit court of the United States in and for the fifth division, district of Minnesota.

Now if the said Missouri, Kansas & Texas Trust Company shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and effect.

In testimony whereof, the said Missouri, Kansas & Texas Trust Company and said National (Surity) Company have caused these presents to be signed by their duly authorized officers and their corporate seals to be hereto affixed, and the said S. F. Boyce has hereunto set his hand and seal this 24th day of July, 1894.

MISSOURI, KANSAS & TEXAS TRUST COMPANY,

[CORPORATE SEAL.] By A. A. MOSHER, *Vice-President.*

Attest:
ROB'T B. CONE, *Secretary.*

NATIONAL SURETY COMPANY,

[CORPORATE SEAL.] By CHARLES A. DEAN, *Vice-President.*

Attest:
W. S. RUGH, *Secretary.*

S. F. BOYCE. [SEAL.]

STATE OF MINNESOTA, } ss:
*County of St. Louis,* }

S. F. Boyce being duly sworn, says that he is a resident and freeholder in said State and county and is worth the sum of
15 $500.00 over and above all property exempt from seizure and sale on above execution.

S. F. BOYCE.

Subscribed and sworn to before me this 25th day of July, 1894.
WM. C. WHITE, [NOTARIAL SEAL.]
*Notary Public, Minnesota.*

Approved by the judge of the district court 11th judicial district. July 25th, 1894.

CHAS. L. LEWIS, *Judge.*

Filed Jul- 26, 1894.

D. J. SINCLAIR,
*Clerk of District Court,*
By J. S. MOODY, *Deputy.*

*Clerk's Certificate.*

STATE OF MINNESOTA, } ss:
*County of St. Louis,* }

District Court, Eleventh Judicial District.

I, D. J. Sinclair, clerk of the district court, St. Louis county, and State of Minnesota, do hereby certify that I have compared the foregoing papers-writing with the original summons, complaint, summons and sheriff's return, affidavit of J. B. Richards, bond on removal to U. S. circuit court and petition and order for removal to U. S. circuit court, in the action therein entitled, now remaining of

record in my office, and that the same is a true and correct copy and transcript of said original files and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 13th day of August, A. D. 1894.

D. J. SINCLAIR, *Clerk*,
By J. S. MOODY, *Deputy Clerk*.

That on the 9th day of October, A. D. 1894, there was filed with the clerk of said court by solicitor for the defendant, a notice of motion to require the plaintiffs to replead, which said notice is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

*Notice of Motion.*

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

To J. B. Richards, Esquire, attorney for plaintiffs.

SIR: You are hereby notified that at the next general term of this court, to be held at the circuit court room in the city of
16 Duluth, Minnesota on the first day of said term, to wit, the 9th day of October, 1894, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion will be made for an order that a rule be entered in the above-entitled cause, requiring the plaintiffs to replead, and thereupon to file such new bill in the usual form of bills in equity so as to conform to the equity practice in this court.

Yours very truly, WM. C. WHITE,
*Attorney for Defendant.*

Dated August 14, 1894.

That on the same day, to wit, on the 9th day of October, A. D. 1894, the following proceedings in said cause were had in open court, to wit:

THEODORE M. KRUMSEIG *et al.*
*vs.*
MISSOURI, KANSAS & — TRUST COMPANY.

Now comes the defendant by its solicitor and moves the court that the plaintiffs be required to recast their complaint which motion was fully argued by counsel for the respective parties, and the court being fully informed therein it is by the court,

Ordered, that said motion be and the same hereby is denied, and that the defendant have until next rule day in which to file its answer.

It appearing to the court that said case is an equity cause, it is by the court,

Ordered, that said cause be, and it hereby is transferred to the equity calendar.

John B. Richards, Esq., appeared as solicitor for the complainant.

That afterwards, to wit, on the 3rd day of November, A. D. 1894, there was filed with the clerk of said court, by its solicitor, the defendant's answer in said cause, which answer is in words and figures as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

The above-named defendant, answering the complaint of plaintiffs herein,

17 I. Denies each and every allegation contained in said complaint, except as the same are hereinafter admitted, denied, qualified or explained.

II. Admits the allegations of paragraphs 1 and 2 of said complaint, except that defendant denies that said mortgage is illegal and void.

III. Admits the allegations of paragraphs 3 and 4 of said complaint and of paragraph 5 thereof.

IV. Denies the allegations of paragraph 6 of said complaint, but admits and alleges that the notes and mortgage described in plaintiffs' complaint and therein set forth, were given by plaintiffs to defendant for and in consideration of a certain loan made by defendant to plaintiffs, legal interest thereon from the date of said loan to its maturity, and a certain guaranty to said plaintiffs upon the part of defendant to cancel and discharge the debt represented by said loan in the event of the plaintiff, Theodore M. Krumseig, dying before the maturity of said loan, which guaranty is set forth in the complaint herein in the body of said mortgage and that the principal sum of said loan and the amount paid by the defendant to said plaintiffs thereupon was $1,970.00, and that said amount, together with the legal interest thereon and the cost of the guaranty aforesaid, constituted the consideration for the promissory notes and mortgage set forth in the complaint.

V. Denies the allegations of paragraph 7 of said complaint; denies that said contract was, is or was by either party thereto understood or agreed to be a life insurance contract; but admits that it was stipulated that said Theodore M. Krumseig should pass such satisfactory medical examination as should be required by defendant, and should pay a fee therefor to the medical examiner of $3.00, and that said examination was passed and said fee so paid and said examination submitted to the Prudential Life Insurance Company and that said company reported favorably thereon; but defendant denies that said Prudential Company undertook or agreed to indemnify and save defendant harmless from all or any loss which might accrue to defendant under its contract with plaintiffs through the possible death of said Krumseig or otherwise, and alleges that the contract with said Prudential Company was the ordinary and usual contract with it for the insurance for the period

of said loan, of defendant's insurable interest in the life of said plaintiff.

18 VI. Admits that defendant has not complied with the laws of Minnesota respecting the transaction of a life insurance business in said State by a foreign corporation, but denies that the contract in question was made in violation of the laws of the State of Minnesota; and denies that it was or is illegal or void; and defendant alleges that said contract was duly made and concluded between the parties thereto at the time and in the manner set forth in the mortgage securing said (promis-ory) notes and was fully understood and agreed to by all the parties thereto and became and is binding upon all of them.

VII. For another and further defense to plaintiffs' complaint, defendant alleges that it is not and at the time this action was begun was not the owner or holder of the said promissory notes and mortgage, and alleges that long prior to the institution of this action, to wit, on the — day of ——, 1891, in the usual course of business and before the maturity of said notes or any of them, defendant sold, assigned, endorsed and delivered said notes and mortgage, for a valuable consideration, to the Union Trust Company of Philadelphia, which company ever since has been and now is the legal owner and holder thereof.

Wherefore, defendant demands judgment against plaintiffs, that the complaint of plaintiffs herein be dismissed and that plaintiffs pay defendant's costs and disbursements herein.

Dated Nov. 3rd, 1894.

WM. C. WHITE,
*Attorney for Defendant,*
706-8 *Torrey Building, Duluth, Minnesota.*

STATE OF MINNESOTA, } ss:
*County of St. Louis,* }

Wm. C. White being duly sworn, says that he is the attorney for the defendant in the above and within entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his information, knowledge and belief; that the reason why this verification is made by affiant and not by defendant, is that the defendant and its officers are non-residents of Minnesota and are absent from the said county and State.

WM. C. WHITE.

Subscribed and sworn to before me this 3rd day of November, 1894.

[NOTARIAL SEAL.] W. D. EDSON,
*Notary Public, Minnesota.*

19 That on the 7th day of January, A. D. 1895, there was filed with the clerk of said court, a stipulation for an additional party defendant, which said stipulation is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

*Stipulation for Additional Party Defendant.*

It is hereby stipulated and agreed by and between J. B. Richards, Esq., attorney for plaintiffs and W. C. White, Esq., attorney for defendant that the Union Trust Company, of Philadelphia, Pa., be made a party defendant hereto without order of the court; and that the plaintiffs' bill be amended by adding the name of said Union Trust Company as defendant, by inserting therein allegations of the corporate character of said Union Trust Company, by changing the word "defendant" therein, to the word "defendants," (whereever) appropriate; and by inserting the words "Missouri, Kansas & Texas Trust Co." where necessary to properly explain the allegations of said bill as referring to the proper defendant intended; it not being the intention of any amendment to change any substantial allegation of the cause of action set forth; and it is agreed that said bill as so amended shall be considered as filed *nunc pro tunc*, of date of and as the original bill herein; and that the answer of the defendant, Missouri, Kansas & Texas Trust Co., now filed be considered the answer to said amended bill in all respects.

Dated Jan. 7th, 1895.

J. B. RICHARDS,
*Attorney for Plaintiffs.*
WM. C. WHITE,
*Attorney for Def't M. K. T. Co.*

That on the 10th day of January, A. D. 1895, there was filed with the clerk of said court by the solicitor for the plaintiff herein, an affidavit and order for service upon absent defendant Union Trust Company, together with an order of the court granting the same, which said affidavit and order are, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY & UNION TRUST COMPANY, Defendants.

*Affidavit for Order for Service upon Absent Defendant, Union Trust Co., of Notice to Appear.*

STATE OF MINNESOTA, *St. Louis County.* } *ss:*

J. B. Richards being first duly sworn on his oath states that he is attorney for the plaintiffs herein; that this action was in 1894

brought in the district court of St. Louis County, State of Minnesota, against the defendant Missouri, Kansas & Texas Trust Company sole defendant, to procure the cancellation and removal, as be- a cloud on the plaintiffs' title, of a certain mortgage, executed by plaintiffs to said defendant on plaintiffs' real estate situate in said St. Louis County in the city of Duluth, of which plaintiffs were in the possession; that said defendant procured the removal of said action to the U. S. court; and did file its answer to the plaintiff-' bill alleging that in the year 1891 it had sold and transferred to defendant Union Trust Co. all its interest in and to the said mortgage and the notes secured thereby, as more fully appears in said answer on file; that thereupon plaintiffs procured the stipulation of the attorney for said Missouri, Kansas & Texas Trust Co., making and adding said Union Trust Co., as party defendant herein, which stipulation was on the 7th day of January, 1895 duly filed in this court.

And affiant alleges that said answer of defendant Missouri, Kansas & Texas Trust Co., alleges that said defendant Union Trust Co., is of Philadelphia, Pa.; and affiant alleges on his information and belief that said Union Trust Co., defendant, is a corporation organized under the laws of the State of Pennsylvania; and that its principal office and place of business is in Philadelphia, Pa., at No. 717 Ches-nut street; that said Union Trust Co. has not voluntarily appeared in said action; nor is it an inhabitant of the State of Minnesota, or within the jurisdiction of this court; nor can personal service of subpœna or process herein be made upon said Union Trust Co., within said State or jurisdiction; nor can it be
21 found therein; nor, to affiant's knowledge, has said Union Trust Co. any agent or person therein who is authorized to receive or accept service of subpœna or process therein.

Wherefore, affiant prays the court for an order directing said defendant Union Trust Co. to appear in said action, plead, answer, or demur, by a day certain, to be designated by the court pursuant to the statute in such cases made and provided; and further affiant saith not. J. B. RICHARDS.

Subscribed and sworn to before me this 8th day of January, 1895.
[NOTARIAL SEAL.] GEO. F. DAVIS,
*Notary Public, St. Louis County, Minn.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY & UNION TRUST COMPANY, Defendants.

*Order Directing Service of Notice to Appear on Union Trust Company, Defendant.*

It appearing from the files in said action and from the affidavit of J. B. Richards, attorney of the plaintiffs, that the Union Trust

Co., of Philadelphia, Pa., is a party defendant in said action; and is a corporation organized under the laws of the State of Pennsylvania; and is not an inhabitant of the State of Minnesota; nor within the jurisdiction of the court; and that is principal office and place of business is at No. 717 Ches-nut street in said city of Philadelphia, Pa.; and that it has no agent or person within the jurisdiction of the court who is authorized to receive or accept service of process herein and that personal service of notice to appear and plead, answer or demur to plaintiffs' bill herein may be made in Philadelphia on said non-resident defendant; and that the object of this action is to remove a cloud and incumbrance upon the title of plaintiffs in and to real property situated in the city of Duluth, St. Louis county, Minnesota, through the cancellation of a mortgage thereon given by plaintiffs to defendant Missouri, Kansas & Texas Trust Co., and alleged to have been transferred and assigned to said defendant Union Trust Co.; and that said Union Trust Co. is now the holder thereof; and that plaintiffs are in possession of said property;

22 Now therefore, upon application of the plaintiffs therefor, it is ordered that the said Union Trust Company, of Philadelphia, Pa., defendant herein, be required to appear in this action and to plead, answer or demur to the plaintiffs' bill herein filed on or before the 10th day of February, 1895, or in default thereof decree may be entered herein against said defendant as on full and complete default and failure to appear; and it is further ordered that this order be served upon said defendant Union Trust Company by delivery of a copy thereof, certified as correct by the clerk of this court, to the president, vice-president, secretary or managing agent or cashier of said Union Trust Company defendant, on or before the 25th day of January, 1895.

Dated at St. Paul, Minn., Jan. 10, 1895.

By the court.

R. R. NELSON, *Judge.*

That on the 12th day of February, A. D. 1895, there was filed with the clerk of said court the return of the service of the order next above mentioned by the United States marshal for the eastern district of Pennsylvania, which said return is, in words and figures, as follows, to wit:

STATE OF PENNSYLVANIA, } ss:
*County of Philadelphia,* }

Loyd J. Hunt being first duly sworn states on his oath that he is deputy marshal of the United States for the eastern district of Pennsylvania; that the annexed order made by Judge Nelson of U. S. circuit court, district of Minnesota, came to his hand on the 17th day of January, 1895; and that he served the said order on the Union Trust Company, of Philadelphia, Pa., known to him to be the Union Trust Company mentioned in said order as defendant, on the 17th day of January, 1895, in the city of Philadelphia, Pa., at 717 Chesnut street, by then and there delivering to and leaving with D.

Howard Foote, the secretary and treasurer of said Union Trust Company, defendant, a true and correct copy of said order, and said copy was duly certified to be a true copy of said order by the clerk of the U. S. circuit court of the district of Minnesota, fifth division, under the seal of the said court attached thereto.

LOYD J. HUNT,
*Deputy U. S. Marshal, E. D. of Penna.*

Subscribed and sworn to before me this 17th day of January, 1895.

[NOTARIAL SEAL.] WM. W. CRAIG,
*Commissioner of the Circuit Court of the United States, Eastern District of Penna.*

23 That on the 12th day of February, A. D. 1895, there was entered by the clerk of said court a decree (*comprofesso*) against defendant Union Trust Company, which said decree is, in words and figures, as follows, to wit:

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY and UNION TRUST COMPANY, Defendants. } No. 177.

This day comes the complainants by J. B. Richards their (silicitor), and files a (preacipe) herein for an order *pro confesso* against the above-named defendant Union Trust Company. And the premises being fully considered, and it appearing that said defendant has been duly and personally served with process and has failed to plead to the bill of complaint herein, within the time prescribed by the order of the court hercin, it is ordered that complainant's bill be taken as confessed.

Dated February 12th, A. D. 1895.

OSCAR B. HILLIS, *Clerk*,
By M. H. WISHART, *Deputy*.

That on the 4th day of March, A. D. 1895, there was filed with the clerk of said court (and) order setting aside the default — the Union Trust Company, which said order is, in words and figures, as follows, to wit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

THEO. M. KRUMSEIG and LOUISE KRUMSEIG, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY *et al.*, Defendants.

*Order Setting Aside Default and Granting Leave to Answer.*

Upon the application of the defendant, The Union Trust Company of Philadelphia, due notice of which appears to have been given to the plaintiff, it is ordered that the default herein against

the said defendant be and the same is hereby set aside, upon the payment of costs and the said defendant is given leave to file answer disclaiming any interest in this suit or the subject-matter in litigation.

Done at chambers in the city of St. Paul, Minnesota, this 13th day of March, 1895.

HENRY S. PRIEST, *Judge.*

24 That on the 14th day of March, A. D. 1895, there was filed with the clerk of said court an order granting leave for the defendant Missouri, Kansas & Texas Trust Company to amend its answer, which said order is in words and figures, as follows, to wit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

THEO. M. KRUMSEIG and LOUISE KRUMSEIG, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY *et al.*, Defendants.

*Order Granting Leave to Amend Answer.*

Upon motion of the defendant, The Missouri, Kansas & Texas Trust Company, due notice of which appears to have been given the plaintiff, it is ordered that the said defendant have leave to amend its answer upon payment of reasonable costs both in this instance and such as complainant has incurred by reason of making the Union Trust Company defendant herein as follows:

1st. By striking out all of paragraph seven.

2nd. By inserting in lieu thereof the following:

"VII. The defendant admits that it is now the owner and holder of the notes and m't'g. in question."

Done at Chambers in the city of St. Paul, Minnesota, this 13th day of March, 1895.

HENRY S. PRIEST, *Judge.*

That on the 14th day of May, A. D. 1895, there was filed with the clerk of said court a stipulation as to the date of filing amended answer, which said stipulation is, in words and figures, as follows, to wit:

United States Circuit Court, District of Minnesota, Fifth Division.

THEODORE KRUMSEIG *et al.*, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY *et al.*, Defendants,

It is stipulated and agreed in the above-entitled matter, that the amended answer of the defendant was filed within the time contemplated and required by law and order of the court, having been held from index by the clerk of the court, because of non-filing of receipt

for payment of costs, though offered for filing and left with
25 the clerk on March 14th, 1895; and that same be filed of this date by the clerk, as though now originally left with him for filing; time of taking evidence to run from this date.

WM. C. WHITE,
*Attorney for Def't M. K. & Trust Co.*
J. B. RICHARDS,
*Att'y for Plaintiffs.*

Dated May 14th, 1895.

That on the 2nd day of July, A. D. 1895, there was filed with the clerk of said court, as of the 14th day of May, 1895, the amended answer of defendant, which said amended answer is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

*Answer.*

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendants.

The above-named defendant answering the complaint of plaintiffs herein, by this its amended answer:

I. Denies each and every allegation contained in said complaint, except as the same are hereinafter admitted, denied, qualified or explained.

II. Admits the allegations of paragraphs 1 and 2 of said complaint, except that defendant denies that said mortgage is illegal and void.

III. Admits the allegations of paragraphs 3 and 4 of said complaint and of paragraph 5 thereof.

IV. Denies the allegations of paragraph 6 of said complaint, but admits and alleges that the notes and mortgage described in plaintiffs' complaint and therein set forth, were given by plaintiffs to defendant for and in consideration of a certain loan made by defendant to plaintiffs, legal interest thereon from the date of said loan to its maturity and a certain guaranty to said plaintiffs upon the part of said defendant to cancel and discharge the debt represented by said loan in the event of the plaintiff, Theodore M. Krumseig dying before the maturity of said loan, which guaranty is set forth in the complaint herein in the body of said mortgage and that the
26 principal sum of said loan and the amount paid by the defendant to said plaintiffs, thereon was $1,970.00 and that said amount, together with the legal interest thereon and the cost of the guaranty aforesaid, constituted the consideration for the promis-ory notes and mortgage set forth in the complaint.

V. Denies the allegations of paragraph 7 of said complaint; denies that said contract was, is or was by either party thereto understood or agreed to be a life-insurance contract; but admits that it was stipulated that said Theodore M. Krumseig should pass such satis-

factory medical examination as should be required by defendant, and should pay a fee therefor to the medical examiner of $3.00, and that said examination was passed and said fee so paid and said examination submitted to the Prudential Life Insurance Company and that said company reported favorably thereon; but defendant denies that said Prudential Company undertook or agreed to indemnify and save defendant harmless from all or any loss which might accrue to defendant under its contract with plaintiffs through the possible death of said Theodore M. Krumseig or otherwise, and alleges that the contract with said Prudential Company was the ordinary and usual contract with it for the insurance for the period of said loan, of defendant's insurable interest in the life of said plaintiff.

VI. Admits that defendant has not complied with the laws of Minnesota respecting the transaction of a life-insurance business in said State by a foreign corporation, but denies that the contract in question was made in violation of the laws of the State of Minnesota, and denies that it was or is illegal or void; and defendant alleges that said contract was duly made and concluded between the parties thereto at the time and in the manner set forth in the mortgage securing said promissory notes and was fully understood and agreed to by all the parties thereto and became and is binding upon all of them.

VII. The defendant admits that it is now the owner and holder of the note in question.

Wherefore defendant demands judgment against plaintiffs, that the complaint of plaintiffs herein be dismissed and that plaintiffs pay defendant's costs and disbursements herein.

WM. C. WHITE,
*Attorney for Defendant.*

Dated March 14th, 1895.

STATE OF MINNESOTA, }
*County of St. Louis,* } ss:

William C. White, being duly sworn, says that he is the attorney for the defendant in the within-entitled action and as
27 such makes this verification; that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, inclination and belief; that the reason why this verification is not made by defendant's officer is that the defendant and all its officers are absent from the State of Minnesota within which affiant resides.

WM. C. WHITE.

Subscribed and sworn to before me this 14th day of March, A. D. 1895.

[NOTARIAL SEAL.] HOWARD T. ARBOTT,
*Notary Public, St. Louis County, Minnesota.*

That on the 2nd day of July, A. D. 1895, there was filed with the clerk of said court a stipulation extending the time for taking testimony, which said stipulation is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

In the above-entitled matter, it is hereby stipulated by and between the counsel for the parties plaintiff and defendant, that the time for taking testimony be and the same is hereby extended for 30 days from the date at which such time would expire under the rules of said court; and further, that no testimony be taken during the month of July, 1895, excepting that under notice therefor, deposition of a foreign witness may be taken during said month if desired, outside of the State of Minnesota.

Dated July 1st, 1895.

J. B. RICHARDS,
*Attorney for Plaintiffs.*
WM. C. WHITE,
*Attorney for Defendant.*

That on the 6th day of September, A. D. 1895, there was
28 filed with the clerk of said court the replication of complainant which said replication is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

*Replication.*

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY and UNION TRUST COMPANY, Defendants.

These repliants, complainants, saving and reserving to themselves all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant Missouri, Kansas & Texas Trust Company, for replication thereunto say that they do and will aver maintain and prove their said complaint to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by these repliants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto confessed or avoided, is true; all which matters and things these repliants are ready to aver,

maintain and prove as this honorable court shall direct and humbly pray as in and by their complaint they have already prayed.

J. B. RICHARDS,
*Solicitor for Complainants*, 301 *Burrows B'ld'g, Duluth, Minn.*

That on the 19th day of October, A. D. 1895, the following proceedings were had in said cause in open court, to wit:

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. } No. 177.

JOHN L. FOOTE and EMELINE G. FOOTE, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. } No. 179.

Now come J. B. Richards, Esq., solicitor for complainants and Wm. C. White, Esq., solicitor for defendants, and state to the court that said causes grow out of similar contracts and are similar in all respects, whereupon it is, by the court,

Ordered—that said causes be tried as one.

29 Whereupon said causes being regularly called for hearing upon the pleadings, final proofs and arguments of counsel, the complainants appearing by J. B. Richards, Esq., their solicitor and the defendant by Wm. C. White, Esq., its solicitor; thereupon said causes are argued by counsel and it is, by the court,

Ordered—that the further hearing of said causes be postponed until Monday morning at 9.30 o'clock.

That on the 21st day of October, A. D. 1895 the following proceedings were had in said cause in open court, to wit:

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. } No. 177.

JOHN L. FOOTE and EMILINE G. FOOTE, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. } No. 179.

This day again come all the parties hereto, by their respective solicitors and further argument is made in said cause to the court, and said cause is duly submitted, and, all parties agreeing thereto, it is, by the court,

Ordered—that all parties herein submit briefs within ten days from this date.

That the evidence submitted to the court in said cause is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

*Notice for Taking Deposition.*

Please to take notice (the) plaintiffs herein wil- take the deposition of the Prudential Life Insurance Cempany, of Newark, New Jersey, a corporation, through any of its officers or agents acquainted with its affairs, all of whom reside out of the State of Minnesota, and more than one hundred (100) miles from any place at which a circuit court of the U. States for the district of Minnesota is appointed to be held by law, for use on behalf of the plaintiff, before William J. Kearns, a notary public in and for Essex county, New Jersey, who is not of counsel, not interested in this action, at
30 the office of said notary public at No. 22 Clinton street, Newark, New Jersey, on the 29th day of July, 1895 at 11 o'clock a. m., and thereafter as the same may be adjourned; and said testimony will be taken in accordance with the provisions of sections 863, 864, & 865 of the Revised Statutes of the United States, and the equity rules.

Dated, July 15th, 1895.

J. B. RICHARDS,
*Attorney for Plaintiffs.*

To William C. White, Esq., attorney for defendant. M. K. & T. Tr. Co.:

Service of the above notice by copy admitted this — day of July, 1895.

WM. C. WHITE,
Per WAITE,
*Defendant's Attorney.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS and TEXAS TRUST COMPANY, Defendants,

It is hereby stipulated and agreed that the testimony &c. in the above-entitled action may be taken stenographically by William J. Kearns, a notary public in and for the State of New Jersey, and that afterwards the same may be transcribed in typewriting by him, the said Willian J. Kearns, notary public as aforesaid, out of shorthand into longhand, and that said deposition or testimony shall then be signed by the witness, and that the evidence so taken shall have the same force and effect as if the same were originally taken in the handwriting of the notary, or of the deposing witness, and may be read in court with like force and effect.

Witness our hands this twenty-ninth day of July, eighteen hundred and ninety-five, at Newark in the county of Essex and State of New Jersey.

DANIFL F. BYRNE,
*Of Counsel with Pl'ffs.*
J. McD. TRIMBLE,
*Of Counsel for Def't.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG Plaintiffs,
*vs.*
MISSOURI, KANSAS and TEXAS TRUST COMPANY, Defendants.

Present: Daniel F. Byrne, Esquire, of counsel with plaintiffs, John McD. Trimble, Esquire, of counsel with defendant.

31 Transcript of stenographic report of the evidence &c., taken by me, the subscriber, a notary public of New Jersey, at my office 22 Clinton street, in the city of Newark, New Jersey, on Monday the twenty-ninth day of July, eighteen hundred and ninety-five, at eleven o'clock in the forenoon of that day, in pursuance of a stipulation in writing entered into by the counsel of the respective parties hereto and hereunto annexed.

WM. J. KEARNS,
*Notary Public in and for New Jersey.*

[NOTARIAL SEAL.]

Deposition of J. Henry Huntington, Jr., produced, sworn and examined the twenty-ninth day of July, eighteen hundred and ninety-five, at Newark, in the State of New Jersey, to be read as evidence on behalf of the plaintiffs, in an action between Theodore M. Krumseig and Louise Krumseig plaintiffs and Missouri, Kansas and Texas Trust Company defendant, pending in the circuit court of the United States, fifth division, district of Minnesota, as follows:

J. HENRY HUNTINGTON, JR., a witness produced on the part of the plaintiffs herein, being duly sworn, on his oath says:

Direct examination.

By Mr. BYRNE:

Q. Do you know that the company has an insurance on the life of Theodore M. or Louise. Krumseig?
A. Yes sir.
Q. On which life?
A. Theodore M. Krumseig.
Q. Was a formal application made for insurance on the life of Theodore M. Krumseig?
A. Yes sir.
Q. When was that made?
A. September 5th, 1890.

Q. Is there a policy of insurance now in force on the life of Theodore M. Krumseig?
A. Yes sir.
Q. Who is the beneficiary named in that policy?
A. The Missouri, Kansas & Texas Trust Company.
Q. What is the date of the policy?
A. September 5, 1890.
Q. What is the amount of the insurance?
A. The amount at the time the policy was taken out, $2,208.
Q. Have the premiums been regularly paid on this policy?
A. Yes sir.
32 Q. What is the amount of premium paid?
A. $6.31 quarterly.
Q. Is there a contract between the Prudential Insurance Company and the Missouri, Kansas and Texas Trust Company in regard to this insurance?
A. Yes sir.
Q. Have you the contract in your possession?
A. Yes sir, I have.
Q. Will you produce it?
A. If necessary; yes sir.

Defendant objects to the introduction of the contract between the Prudential Insurance Company of America and the Missouri, Kansas & Texas Trust Company and also to any evidence as to the amount of premium charged for the insurance which the Prudential Insurance Company issued on the life of Theodore M. Krumseig, for the reason and on the grounds that the same are immaterial and and irrelevant and do not tend to sustain any proper issue in this case.

Objection renewed.

(Original contract between the Prudential Insurance Company of America, Newark, New Jersey and the Missouri, Kansas and Texas Trust Company of Kansas City, Missouri dated the 27th of February, 1889 is produced and offered in evidence by the plaintiffs and the same is marked Exhibit A for the plaintiffs.)

It is stipulated and agreed between the counsel of the respective parties hereto that a copy of said contract may be annexed to these depositions, and the production of the original is waived.

Q. Is this agreement still in force between your company and the Missouri, Kansas and Texas Trust Company?
A. Yes sir.
Q. And the insurance upon the life of Theodore M. Krumseig under this agreement is also still in force?
A. Yes sir.
Q. Please state the number of the policy on the life of Theodore M. Krumseig.
A. No. 4452.
Q. Is that an original insurance or a reinsurance?
A. Original insurance. There is no reinsurance, not with that company.

Q. What is your name and address?
A. J. Henry Huntington Jr. I reside at 34 Johnson avenue, Newark, N. J.
Q. What is your business?
33 A. Chief clerk, ordinary branch, Prudential Insurance Company of America.
Q. Are you familiar with all the transactions of the company's business in that branch?
A. In so far as the practical work is concerned, yes.
Q. That's all.

Cross-examination.

By Mr. TRIMBLE:

Q. The policies issued under the contract which you have introduced in evidence were issued, were they not, upon what is called the renewable reducing term plan?
A. Yes, sir.
Q. How long has your company been engaged in issuing policies upon that plan?
A. To my recollection ever since that contract was in force with your company.
Q. Did you issue policies upon that plan to individuals?
A. No, only to some building and loan associations.
Q. Have you quit the business of issuing policies upon that plan?
A. Yes, in that we make no more contracts of that sort. We are bound by old contracts, of course.
Q. Do you know of any other company that does issue policies on that plan?
A. Not to my knowledge.
Q. Are the premiums which are provided for in this contract less or greater than the ordinary term policy?
A. They are less.
Q. State whether it is usual in life insurance matters to charge a higher rate of premium where the premium is paid quarterly than if it was paid annually?
A. Yes.
Q. Would there be still a higher premium if it was paid monthly instead of quarterly?
A. Yes.
Q. Do you know, Mr. Huntington, whether the rates provided for in the contract introduced in evidence are low rates?
A. Yes sir, they are very low.
Q. What expense, if any, was your company put to in the matter of this insurance as to collecting premiums, or otherwise?
A. None whatever. We constituted the trust company our general agent and looked to them to assume all the expenses for
34 the collection of the premiums. With regard to medical examinations, I think that is covered in the contract.
Q. The trust company then assumes all the expense of collecting the premiums, and also the risk of not collecting them at all?

A. Yes sir.

Q. You know nothing of your own knowledge what arrangement the trust company had with Mr. Theodore M. Krumseig out of which this insurance arose?

A. No sir, I do not.

Q. If any individual—any single individual should apply to your company for insurance upon this plan, would it be issued to him?

A. It would be an arbitrary matter to be decided by the manager, but without doubt not at that rate.

Q. By whom was the application made for the insurance referred to in this deposition by you?

A. The Missouri, Kansas and Texas Trust Company.

Q. That's all.

J. HENRY HUNTINGTON, JR.

Sworn to before me the day and year aforesaid.

WM. J. KEARNS,

[NOTARIAL SEAL.] *Notary Public of New Jersey.*

EXHIBIT "A" COPY.

This agreement made and entered into this twenty-seventh day of February, in the year one thousand, eight hundred and eighty-nine by and between the Prudential Insurance Company of America, of Newark, N. J., hereinafter designated as the Prudential, and the Missouri, Kansas and Texas Trust Company, of Kansas City, Mo., hereinafter designated as the trust company,

Witnesseth: That the Prudential in consideration of the premiums hereinafter mentioned and upon the following terms and conditions agrees to insure in favor of the trust company the lives of certain persons whose physical condition may be acceptable to the said Prudential:

First. The persons whose lives are proposed for insurance must be debtors unto the trust company in a sum equal, at least, to the amount of insurance requested.

Second. The policies of insurance shall be issued upon the renewable reducing term plan. They may be severally renewed for not more than ten successive years and shall be non-participating. The premiums shall be adjusted on the basis of a term insurance for one year and the amount of insurance under each policy shall decrease each year according to the provisions of the seventh section of this agreement.

35 Third. The trust company shall furnish to the Prudential for approval a list of medical examiners by whom the persons whose lives are to be insured shall be examined.

Fourth. The expense of conducting the examination shall be borne by the Prudential.

Fifth. The rates of premium per $1,000 shall be as given in the following table, by which the rate to be paid in each and every year over which each policy extends is that corresponding to the actual age of the life insured in that year.

*Premiums per* $1,000.

| Age. | Annual. | Semi-annual. | Quarterly. |
|---|---|---|---|
| 21 | $9 50 | $4 94 | $2 52 |
| 22 | 9 64 | 5 01 | 2 55 |
| 23 | 9 81 | 5 10 | 2 60 |
| 24 | 9 99 | 5 19 | 2 65 |
| 25 | 10 17 | 5 29 | 2 70 |
| 26 | 10 37 | 5 39 | 2 75 |
| 27 | 10 57 | 5 50 | 2 80 |
| 28 | 10 80 | 5 62 | 2 86 |
| 29 | 11 02 | 5 73 | 2 92 |
| 30 | 11 27 | 5 86 | 2 99 |
| 31 | 11 52 | 5 99 | 3 05 |
| 32 | 11 80 | 6 14 | 3 13 |
| 33 | 12 09 | 6 29 | 3 20 |
| 34 | 12 38 | 6 44 | 3 28 |
| 35 | 12 70 | 6 60 | 3 37 |
| 36 | 13 02 | 6 77 | 3 45 |
| 37 | 13 36 | 6 95 | 3 54 |
| 38 | 13 74 | 7 14 | 3 64 |
| 39 | 14 11 | 7 34 | 3 74 |
| 40 | 14 50 | 7 54 | 3 84 |
| 41 | 14 93 | 7 76 | 3 96 |
| 42 | 15 41 | 8 01 | 4 08 |
| 43 | 15 97 | 8 30 | 4 23 |
| 44 | 16 65 | 8 66 | 4 41 |
| 45 | 17 42 | 9 06 | 4 62 |
| 46 | 18 33 | 9 53 | 4 86 |
| 47 | 19 31 | 10 04 | 5 12 |
| 48 | 20 37 | 10 59 | 5 40 |
| 49 | 21 51 | 11 19 | 5 70 |
| 50 | 22 77 | 11 84 | 6 03 |
| 51 | 24 10 | 12 53 | 6 39 |
| 52 | 25 58 | 13 30 | 6 78 |
| 53 | 27 18 | 14 13 | 7 20 |
| 54 | 28 88 | 15 02 | 7 65 |
| 55 | 30 75 | 15 99 | 8 15 |
| 56 | 32 78 | 17 05 | 8 69 |
| 36 57 | 34 92 | 18 16 | 9 25 |
| 58 | 37 25 | 19 37 | 9 87 |
| 59 | 39 80 | 20 70 | 10 55 |
| 60 | 42 63 | 22 17 | 11 30 |
| 61 | 46 02 | 23 93 | 12 20 |
| 62 | 49 73 | 25 86 | 13 18 |
| 63 | 53 75 | 27 95 | 14 24 |
| 64 | 58 16 | 30 24 | 15 41 |
| 65 | 62 92 | 32 72 | 16 67 |
| 66 | 68 13 | 35 43 | 18 05 |
| 67 | 73 79 | 38 37 | 19 55 |
| 68 | 78 89 | 41 54 | 21 17 |
| 69 | 86 45 | 44 95 | 22 91 |
| 70 | 93 56 | 48 65 | 24 79 |

Sixth. The trust company shall be allowed a commission of twenty-five per cent. on the premiums paid in the first year of each policy and a commission of ten per cent. on the premiums paid in each and every year thereafter during the (continuance) of the policy.

Seventh. The amount of insurance to be mentioned in each policy shall be the amount of insurance at the beginning of its first year, and the amount of insurance under each and every policy shall decrease year by year in the proportion exhibited in the appended table, wherein the initial amount is $1,000.

| | | | | |
|---|---|---|---|---|
| First | year | insurance | is ..... | $1,000 |
| Second | " | " | " ..... | 902 |
| Third | " | " | " ..... | 829 |
| Fourth | " | " | " ..... | 748 |
| Fifth | " | " | " ..... | 660 |
| Sixth | " | " | " ..... | 562 |
| Seventh | " | " | " ..... | 455 |
| Eighth | " | " | " ..... | 337 |
| Ninth | " | " | " ..... | 207 |
| Tenth | " | " | " ..... | 70 |

Eighth. When claim is made by the trust company for the insurance under any policy, the said trust company shall furnish to the Prudential proofs of the death of the insured on the forms to be furnished by the Prudential for that purpose. It is also understood and agreed that no claim shall be made by the trust company for an amount greater than the amount of indebtedness of the person whose life was insured to the trust company at the time of his, or her, death.

37 Ninth. Unless otherwise arranged by special agreement the premiums on the policies issued by the Prudential shall be due and payable at the home office of the said Prudential in the city of Newark, New Jersey, on the date mentioned in the policies, and if not so paid on any policy, or policies, such corresponding policy, or policies, shall be null and void.

Tenth. The policies of insurance are issued by the Prudential and accepted by the trust company with the distinct understanding and agreement that if any of the insured within two years from the date of the policy shall commit suicide, or shall visit, or travel, in the torrid zone, without the written consent of the Prudential, or shall personally engage in any specially hazardous occupation or pursuit, as mentioned in the application, then the policies of insurance upon their lives shall cease and determine and be of non-effect and void.

Eleventh. The obligation of the Prudential to issue new policies to the trust company may be terminated at any time after thirty days' notice to the trust company.

In witness whereof the parties to this agreement have by their

respective presidents and secretaries signed and delivered the same the day and year first above written.

(Signed) JOHN F. DRYDEN,
*President Prudential Ins. Co of America.*

(Signed) EDWARD S. JOHNSON,
*Secretary Prudential Ins. Co. of America.*

(Signed) J. E. McKEIGHAN,
*President Missouri, Kansas & Texas Trust Co.*

(Signed) E. J. DAVISON,
*Secretary Missouri, Kansas & Texas Trust Co.*

UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

I, William J. Kearns, a notary public in and for the State of New Jersey, duly appointed by the governor of the said State of New Jersey, and commissioned and sworn, do hereby certify that on the 29th day of July, in the year of our Lord one thousand eight hundred and ninety-five, I was attended by Daniel F. Byrne, Esq., of counsel with the plaintiffs herein, and by John McD. Trimble, Esq., of counsel with the defendant herein, and by the witness, J. Henry Huntington, Esq., who was of sound mind and lawful age,
38 and the witness, said J. Henry Huntington, Jr., by me first carefully examined and cautioned, and sworn, to testify the truth, the whole truth, and nothing but the truth, and the deposition of said J. Henry Huntington, Jr., the witness aforesaid being by me reduced to typewriting, in pursuance of the stipulation signed by counsel and hereunto annexed, and after carefully having read the same to the said witness, he subscribed the same in my presence.

And do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this twenty-ninth day of July in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nin-teenth year.

[NOTARIAL SEAL.] WM. J. KEARNS,
*Notary Public of New Jersey.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, }
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY *et al.*, Defendant-. }

At ten o'clock a. m., September 6th, 1895, the complainant in the above-entitled action appears in person and by his attorney, J. B. Richards, Esq., and the taking of testimony is deferred, through the absence of the attorney for the defendant-, until eleven o'clock a. m. this date.

At eleven o'clock a. m., the attorney for the defendant- being absent, the taking of testimony is further deferred until 10 o'clock a. m., September 17th, 1895.

September 17th, 1895, at ten o'clock a. m. pursuant to above, the complainant in the above-entitled action being present in person and by attorney, and the attorney for the defendant- being present, the examination is proceeded with.

Stipulation.—"It is stipulated by and between the respective counsel that the testimony in this case may be taken in shorthand and afterwards transcribed in longhand and put in typewriting, the same to be thereafter subscribed by the witnesses."

39 In accordance with the above stipulation Clarence R. Smith was sworn in manner provided by law.

THEODORE M. KRUMSEIG, being duly sworn, on examination testifies as follows:

Q. You are the plaintiff in this case, one of them, Mr. Krumseig?
A. Yes, sir.
Q. What is your age?
A. 33 years.
Q. With what agent of the defendant, The Missouri, Kansas & Texas Trust Company, did you have the dealings leading up to the making and closing of the loans in this case?
A. W. P. Mosier.
Q. Of Duluth?
A. Yes, sir.
Q. What was your age at the date of the contract that was made?
A. 28.
Q. Did you submit to a medical examination prior to the making and closing of a loan?
A. Yes, sir.
Q. When was that had?
A. I don't remember the date. It was right after I made the application for the (*laon*). When I made the application I was informed that I would have to pass examination.
Q. What was said about that?

(Question objected to; also all evidence concerning the examination of the contract for examination as incompetent, immaterial and irrelevant, and further, for the reason that the application, the written application for insurance is the best evidence as to anything of that nature.)

(Question withdrawn.)

By Mr. WHITE: I move that the answer be stricken out—that part of the answer which states that he was compelled to undergo a medical examination be stricken out as not responsive.

(Motion resisted.)

(Exception.)

Q. Did your wife take any part in the conversation or transac-

tions with Mr. Mosier leading up to the making or closing of that contract?

A. No, sir.

40 Q. You acted for yourself and her in making all arrangements?

A. Yes, sir.

(Witness is shown the original loan application signed by himself, pursuant to which the (*the*) contract was made and closed, and his attention is called to that portion of the same wherein (*is*) says "I agree to execute and deliver to the said company ten promissory notes, each of the sum of $360 payable in monthly installments of $30 commencing at date of signing contract," and is asked as follows:)

Q. Was there anything said before signing the same, or was there any special or agreed price fixed upon or talked over between you and the agent of the company at the time before actually signing the notes and mortgage, and as to the price which you were to pay as consideration for the agreement in the mortgage to cancel the debt in case of your death?

(Objected to as incompetent.)
(Exception.)

A. No, sir.

Plaintiffs offer in evidence the application for the loan, marked "Application No. 354," signed by the plaintiff, Theodore M. Krumseig, dated July 29th, 1890, with the examiner's report connected therewith marked "Plaintiffs' Exhibit B."

(Objected to as incompetent and immaterial.)
(Exception.)

Plaintiffs next offer in evidence the policy of insurance issued under date of September 5th, 1890, by the Prudential Insurance Company of America, of Newark, New Jersey, running to the Missouri, Kansas & Texas Trust Company, of Kansas City, Missouri, No. 4452, covering the life of Theodore M. Krumseig, marked "Plaintiffs' Exhibit C."

The copy offered is hereby stipulated to have the same effect as the original, subject to objection, and the signatures being waived.

(Objected to as incompetent, irrelevant and immaterial.)
(Exception.)

It is admitted that the Missouri, Kansas & Texas Trust Company, for the purposes of this case, was not a building & loan association or society.

41 Q. The amount of cash you actually received at the time of the loan was what?

A. $1,970.

Cross-examination.

By Wm. C. White, Esq.:

Q. The difference between $1,970 and $2,000 was reserved by the company as a first payment—the first of these monthly payments?

A. Yes, sir.

Q. The signature of this loan application is your signature and was written by you at the time it bears date?

A. Yes, sir.

Plaintiff next offers in evidence articles of association of defendant (by copy), as Exhibit D, for the purpose of showing the purposes for which defendant was organized, special reference being made to article seventh.

Objected to as incompetent, irrelevant and immaterial, but not on the ground of its not being the original.

Exception.

W. H. Squier, sworn on behalf of the plaintiffs, on examination testifies as follows:

Direct examination.

By J. B. Richards, Esq.:

Q. Mr. Squier, what is your name, age, residence and occupation?

A. Duluth is my residence. In the insurance business—life-insurance business.

Q. What is your age?

A. 28.

Q. How long have you been engaged in the life-insurance business?

A. Five years.

Q. Are you familiar with the rates of premium of the different leading companies of the United States on what is known as the ten year term non-participating plan?

A. Yes, sir.

Q. On this plan is it the practice of the companies to charge an increasing annual rate of premium as the age increases, or is it the rate fixed once for all at the date of contract?

A. It is fixed at the beginning.

42 Q. With what company are you now connected?

A. The Mutual Life Insurance Company of New York.

Q. Will you give their rate of premium per thousand at the age of 28 and upwards to the age of 40 on that plan?

(Question objected to as incompetent, irrelevant and immaterial.)
(Exception.)

A. At the age of 28, $13.76 per year; 29, $14; 30, $14.26; 31, $14.54; 32, $14.84; 33, $15.17; 34, $15.52; 35, $15.89; 36, $16.31; 37, $16.75; 38, $17.25; 39, $17.78; 40, $18.37.

Q. Was this the rate of premium in 1889 and 1890?

(Objection; same reason.)
(Exception.)

A. It was, yes, sir.

Q. Is the rate you have given of the Mutual Life of New York higher or lower than that of other companies on the same plan and age?

(Objection for the same reason and because the witness has not shown knowledge.)

A. It is as high as that of any company.

Q. Do you know the rates of other companies, leading companies in the United States, on that plan?

A. I know the rates of some of them. In answer to the previous question I mean the rate is as high as those that I know.

Q. Will you give the comparative rates of other companies on the same plan for the age of 28?

(Objection, same ground.)
(Exception.)

A. The Equitable of Iowa is $11.84; the Michigan Mutual $11.65; the Northwestern of Milwaukee $12.26; the Penn Mutual of Philadelphia $12.55; the United Central of Cincinnati, $11.69; the Vermont Life, $11.65.

Q. Now, were those rates generally published and known in the United States in 1889 and 1890?

(Objection, same reason.)
(Exception.)

A. Yes, sir. This book from which I quote was not published in that year.

Q. In what year was it published?

A. In 1892; it was published in 1892; they were the rates in force at that time.

43 Q. I will ask you, from your knowledge of the life-insurance business, whether there is any material change in the rates from one year to another?

(Objection, same reason.)

A. No, there is no material change.

Q. Do you know from your experience that the rates published are the rates on which the policies are issued?

(Objection, same reason.)
(Exception.)

A. I do.

Q. Was it possible in the year 1890 for a private individual to obtain insurance for sums less than $1,000?

(Objection, same reason.)
(Exception.)

A. It was if he was a good risk physically.

Cross-examination.

By Mr. WHITE:

Q. Where did you get these comparative statistics?

A. In the first instance I got them from the Mutual Life Insurance Company, from their own rate book. The others are from a book published by A. J. Flitcraft, of 609 Maple avenue, Oak Park, Illinois. It is a book that he publishes every year giving the premium rates of the companies and their forms of policies, etc., the rates being those of the companies themselves.

Q. Do you know that of your own knowledge?

A. No, that is my understanding.

Q. What do you mean by a non-participating policy?

A. A policy that has no share in the profit earnings of the company; simply a promise to pay if the man dies.

Q. And if he does not die he gets nothing?

A. Yes.

Q. I suppose you know nothing personally of your own knowledge about the relative standing of the companies that you have given statistics of, do you?

(Objected to as incompetent and irrelevant and not proper cross-examination.)

A. No, sir, nothing only what I have learned from the statements of the insurance department.

44 Q. Does that book that you have show the comparative rates of all sorts of policies issued by the companies named?

A. Yes, sir, very nearly all at any rate; I think all.

W. H. SQUIER.

WILLIAM E. COVEY, sworn on behalf of the plaintiff, on examination testifies as follows:

Direct examination.

By Mr. RICHARDS:

Q. What is your name, age, residence and occupation?

A. William E. Covey. Duluth. 46. Life insurance.

Q. How long have you been engaged in that business?

A. About nine years.

Q. Are you familiar with the rates of premium of the different leading companies of the United States on what is known as the ten-year term non-participating plan?

A. In a general way.

Q. How would you answer that question—yes, or no?

A. Yes.

Q. On that plan is it the practice of the companies to charge an increasing annual rate of premium as the age advances, or is the rate fixed once for all at the date of the contract?

A. Usually fixed at the age with the old line companies. Assessment companies vary; they don't issue what is termed a ten-year renewable term.

Q. With what company are you connected?
A. Equitable Life Assurance Society of the United States.
Q. Do you know their rate of premium per thousand for insurance at the age of 28 on the ten-y'r term non-participating plan?

(Objected to as incompetent and immaterial.)
(Exception.)

A. $13.76.
Q. Will you give the rate for the age of 31?

(Same objection.)
(Exception.)

A. $14.54.
Q. Was that the same rate in 1889 and 1890?

(Same objection.)
(Exception.)

A. I couldn't swear; my impression is that it was. They have undergone some of these terms a slight change.
45 Q. In what period of years?
A. In the last three or four years.
Q. Advancing or decreasing?
A. A very slight advance where the change has occurred.
Q. And the figures that you have given are the advanced rate?
A. Yes.
Q. Is the rate which you have given, of the Equitable, higher or lower for the age of 28 and 31 than those of other companies on the same plan and ages?

(Objection, same ground; and because no knowledge has been shown.)
(Exception.)

A. I couldn't state positively; my impression is that the rate of the Equitable and the Mutual Life are as high as any of the same class; on that class of insurance there are some that are lower.
Q. How is your knowledge derived as to the rates of the companies?
A. Printed rates by the companies.
Q. Is it the custom in the life-insurance business of the companies to publish their rates of premium?
A. It is.
Q. Is that the universal rule.
A. It is.
Q. Could they do business unless they did publish their rates, more than mere local business?

(Same objection.)
(Exception.)

A. I don't see how they could.
Q. The rates that are published in the books and pamphlets are reliable as rates on which they will issue policies.

(Same objection.)
(Exception.)

A. Anything issued by the company. Their own rates would be reliable.

Q. Do you know the comparative rates of other companies than the Equitable on this ten-year renewable plan for the age of 28?

A. No; except by comparison—to give exact figures.

Q. You have the tables, published tables, have you?

46 A. I happen to have in my pocket, here, two or three forms, or rates of two or three different companies.

Q. Will you give the comparative rates of those you have—on the same plan—ten-year renewable, non-participating, age of 28.

(Objected to as immaterial)
(Exception.)

A. Manhattan Life of New York at age 28 the rate is $14.35.

Q. Is that non-participating or participating?

A. Well, there is a surrender paid-up value at the end of the ten-year period or periods to them in case of lapse. It is not a participating policy, strictly speaking, but in case of a lapse prior to the end it has a paid-up value.

Q. I am speaking more particularly, Mr. Covey, of a strictly non-participating?

A. I don't think I can give you any rates for that. This would be called a non-participating policy, flat rate, called renewable term insurance.

Q. These rates, that you have mentioned and given, were those upon which insurance upon the terms proposed could be obtained in the years 1889 and 1890?

A. I couldn't swear as to that.

Q. Would there be any material difference?

(Objection, same ground.)
(Exception.)

A. No, sir.

Q. Your knowledge as to the rates is derived, as I understand it, from the published rates to which you have access in your business and also, I suppose, from your competition running up against competing rates of other companies in actual business?

(Objected to on same grounds, and as leading.)
(Question withdrawn.)

A. My knowledge is gained from the printed rates of the company.

Q. You mean to say that you have no actual, personal knowledge?

A. I have no knowledge except from their printed rates.

Q. Agents, in writing insurance, depend usually, if not almost wholly, on the printed rates of the company?

A. Yes.

47 Q. Was it possible in 1889 and 1890 for any private individual to obtain insurance on satisfactory risks for sums less than $1,000?

(Objections, same grounds.)
(Exception.)

A. I presume it was.

WM. E. COVEY.

Plaintiff rests.

Hearing continued until 10 a. m., Sept. 18th, for the taking of testimony for the defendant.

The Prudential Insurance Company of America.

Home office, Newark, N. J.

Number 4452. Amount, $2,208.

Age, 28.

Ordinary branch.

Doth hereby insure the Missouri, Kansas and Texas Trust Company of Kansas City, Missouri, in the initial amount of twenty-two hundred eight dollars upon the life of Theodore M. Krumseig of Duluth county of St. Louis, State of Minnesota, in accordance with the terms and conditions of the contract between the above-named corporations, dated February 27th 1889.

In witness whereof, the said The Prudential Insurance Company of America at its office in the city of Newark New Jersey has by its president and secretary signed and delivered this policy this 5th day of Sept. one thousand eight hundred and ninety.

—— ——, *Pres't.*
—— ——, *Sec'y.*

Application No. —.

I hereby make application to the Missouri, Kansas and Texas Trust Co. of Kansas City, Mo., for a loan of $2,000.00 upon lot No. seven (7) block No. sixty-two (62) of Portland Division addi-
48 tion, city of Duluth county of St. Louis State of Minnesota, which property I now own in fee and the abstract to which accompanies this application.

My full name is Theodore M. Krumseig. Address in full (street and number). 1014 East Third Str. Age, 28 years. Are you single or married? Married. Name of wife? Louise. Have you a family? If so, number of children and how many are dependent on you for support? Two children, depending on me, wife and 2 children. Present occupation? Book-keeper. How long? 4 years. Former occupation? Agent. How long? 2 years. Income? (Please state amount and from what sources.) Salary $80.00 per month. Name present employer? Williams, Upham & Co. Refer to N. C. Harvey & Co., Duluth, Plumbing Co., Williams, Upham & Co. and R. J. Ryan. Rental value, monthly? Thirty dollars (30.00). What is the street number and name of street? 1014 East Third St. Has grade been established? Yes. What is the size of the lot? 25 x 140

ft. Is the street in front paved? Yes. If so, with what? Gravel (Telford). Flagged? 8 ft. sidewalk (plank) both sides of street. Sewered? Yes. Are there gas pipes? Yes. Water pipes? Yes. Means of transportation to this land—cable or horse car? Horse R. R. being changed to electric. How near is it to land? 3 blocks. What was the assessed value of this property for taxation last year? In whom is the title to said premises vested? Theodore M. Krumseig. Are there any mortgages, judgments, taxes, special tax bills or other liens against the property? If so, describe them? Mortgage of $1,500.00 and note of $150.00 which I wish to pay off and use balance to finish basement, grade and sod lot, etc. The house cost $1,500.00. Amount asked for $2,000.00. The value of the lot is $1,600.00. Total value $3,100.00.

In consideration of the above premises I agree to execute and deliver to the said company 10 promissory notes, each of the sum of $360, payable in monthly installments of $30.00 commencing at date of signing contract. The said notes cover principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements.

The contract hereafter to be entered into, if my application should be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing, in case of my death before payment of any unpaid installments,
49 a release of unpaid portion of debt, if I shall have promptly paid previous installments and kept other conditions.

As part of foregoing condition, I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual fee of $3.00 therefor; and to pay all fees for recording deed of trust or mortgage.

This application and proposal to stand open for acceptance for 10 days from date hereof.

(Signed) THEODORE M. KRUMSEIG.

Date July 29th, 1890.

*Examiner's Report.*

Ground made or natural, natural; locality healthy, yes; neighborhood improving, yes; steady, regular or spasmodic, steady; adjoining premises are occupied, viz: residences. The amount of rent the premises would bring 30 to 35 the street improvements are all made. The access by steam or street cars, Superior St. 3 blocks, 4th St. 1 block, both to be electric lines. Would a house of the value asked for be suitable for that locality. Similar to many houses in the locality.

I have carefully examined the above-described property.

| | |
|---|---|
| The ground is worth ..... | $1,600 |
| The improvements are worth..... | 1,500 |
| Total ..... | 3,1000 |

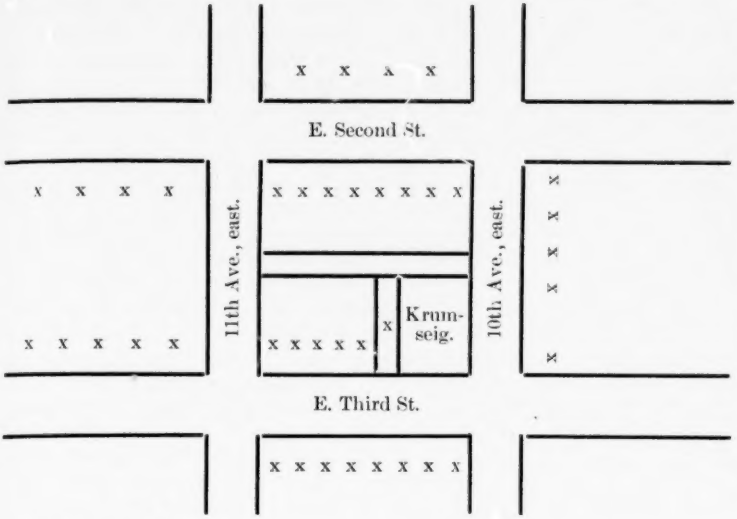
Borrower, character good; standing good. Book-keeper.

(Give standing (of) the community, character, occupation, success therein, etc.)

Not personally acquainted with him but hear only good of him.

Show on diagram location of this property and of other residences.

50




Date Aug. 11, 1890.

O. P. STEARNS, *Examiner.*

Know all men by these presents, that we, the undersigned, have and do hereby associate ourselves together for the purpose of forming and organizing a corporation under article XXI of chapter 21 of the Laws of the State of Missouri, as found in 1885, Session Laws of said State, page- 103 and 107, approved March 20th, 1885, and as amended by act of legislature of said State, approved March 31st, A. D. 1887, page- 116 and 117 of Acts of 1887.

First. The corporate name of the said proposed corporation is and shall be Missouri, Kansas & Texas Trust Company.

Second. The said proposed corporation is to be located in the city of Kansas, State of Missouri, with branch office in the city of St. Louis, if desired, or such other place or places as may be designated by the board of directors of said proposed corporation.

Third. The amount of the capital stock of said proposed corporation authorized by this agreement is one million dollars, divided into ten thousand shares of the par value of one hundred dollars each, and the amount of said capital stock actually subscribed in good faith at the time of filing this agreement is three hun-
51 dred and sixty-four thousand, three hundred dollars, more than one-half of which capital stock so subscribed has been

actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors.

Fourth. The names and places of residence of the several shareholders and the number of shares subscribed by each, are as follows:

| Names. | Residences. | No. of shares. |
|---|---|---|
| A. E. Stilwell | Kansas City, Missouri | 3,623 shares. |
| J. E. McKeighan | St. Louis, Missouri | One share. |
| E. L. Martin | Kansas City, Missouri | One share. |
| L. E. Davison | Kansas City, Missouri | One share. |
| S. M. Kennard | St. Louis, Missouri | One share. |
| Charles M. Hays | St. Louis, Missouri | One share. |
| H. A. Lloyd | St. Louis, Missouri | One share. |
| Winthrop Smith | Philadelphia, Pennsylvania | One share. |
| George C. Smith | St. Louis, Missouri | One share. |
| Charles A. Dean | Omaha, Nebraska | One share. |
| C. E. Granniss | New Haven, Connecticut | One share. |
| J. H. Richards | Fort Scott, Kansas | One share. |
| L. L. Culver | St. Louis, Missouri | One share. |
| Charles L. Hyde | New York, N. Y. | One share. |
| B. F. Hobart | St. Louis, Missouri | One share. |
| M. C. Curtis | Kansas City, Missouri | One share. |
| Edward W. Marsh | Bridgeport, Connecticut | One share. |
| E. J. Davison | Kansas City, Missouri | One share. |
| S. C. Douglass | Kansas City, Missouri | One share. |
| A. A. Mosher | St. Louis, Missouri | One share. |
| B. P. Waggener | Atchison, Kansas | One share. |

Fifth. The number of the board of directors is twenty-one and the names of those agreed upon for the first year are as follows: J. E. McKeighan, A. E. Stilwell, E. L. Martin, L. E. Davison, S. M. Kennard, Charles M. Hays, H. A. Lloyd, Winthrop Smith, George C. Smith, Charles A. Dean, C. E. Granniss, J. H. Richards, L. L. Culver, Charles L. Hyde, B. F. Hobart, M. C. Curtis, Edward W. Marsh, B. P. Waggener, E. J. Davison, S. C. Douglass, A. A. Mosher.

Six. The number of years the said corporation shall continue is fifty.

Seventh. The purposes for which said corporation is formed are as follows:

First. To receive moneys in trust, and to accumulate the same at such rates of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed not exceeding in either case the legal rate; second, to accept and execute all such trusts and perform such duties of every description as may be com-
52 mitted to them by any person or persons whatsoever, or any corporations, or may be committed or transferred to them by order of any of the courts of record of this State or other State, or of the United States; third, to take and accept by grant, assignment, transfer, devise or bequest, and hold any real or personal estate or trusts created in accordance with the laws of this State, or other

States, or of the United States, and execute such legal trusts in regard to the same, on such terms as may be declared, established, or agreed upon in regard thereto, or to execute or guarantee any bond or bonds required by law to be given in any proceeding in law or equity in any of the courts of this State or other State, or of the United States; fourth, to act as agent for the investment of money for other persons, and as agent for persons and corporations for the purpose of issuing, registering, transferring or countersigning the certificates of stock, bonds or other evidence of debt of any corporation, association, municipality, State or public authority, on such terms as may be agreed upon; fifth, to accept from and execute trusts for married women, in respect to their separate properties, whether real or personal, and act as agents for them in the management of such property, and generally to have and exercise such powers as are usually had and exercised by trust companies; sixth, to act as guardian or curator of any infant or insane person, under the appointment of any court of record having jurisdiction of the person or estate of such infant or insane person; seventh, to guarantee the fidelity and diligent performance of their duty of persons holding places of public or private trust; eighth, to loan money upon real estate and collateral security, and improve such real estate with such loans for the better securing the same, and execute and issue its notes and debentures payable at a future date, and to pledge its mortgages on real estate and other securities, as security therefor; ninth, to buy and sell all kinds of Government, State municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks and other investment securities.

Witness our hands and seals this 8th day of February, A. D. 1889.

| | |
|---|---|
| JNO. E. McKEIGHAN. | [SEAL.] |
| A. E. STILWELL. | [SEAL.] |
| SAM. M. KENNARD. | [SEAL.] |
| A. A. MOSHER. | [SEAL.] |
| CHAS. M. HAYS. | [SEAL.] |
| H. A. LLOYD. | [SEAL.] |
| GEO. C. SMITH. | [SEAL.] |
| L. E. DAVISON. | [SEAL.] |
| E. J. DAVISON. | [SEAL.] |
| M. C. CURTIS. | [SEAL.] |

53 STATE OF MISSOURI, } ss:
*City of St. Louis,* }

Be it remembered that on the 8th day of February, A. D. 1889, personally appeared before the undersigned, a notary public in and for the said city of St. Louis, J. E. McKeighan, Sam. M. Kennard, A. A. Mosher, Charles M. Hays, H. A. Lloyd and George C. Smith, who each are personally known to me to be the persons described in the foregoing agreement and who executed the foregoing agreement, and severally acknowledged that they and each of them executed the same as their free act and deed.

In witness whereof, I have hereunto set my hand and seal at said city of St. Louis, the day and year first hereinbefore written.

My term of office expires on the 20 day of September, 1892.

[L. S.] R. B. MERIWETHER,
*Notary Public.*

STATE OF MISSOURI, } ss:
*County of Jackson,* }

Be it remembered that on the 11th day of February, A. D. 1889, personally appeared before the undersigned, a notary public within and for the said county of Jackson, A. E. Stilwell, L. E. Davison, E. J. Davison, and M. C. Curtis, who each are personally known to me to be the persons described in the foregoing agreement and who executed the foregoing agreement, and severally acknowledged that they and each of them executed the same as their free act and deed.

In witness whereof I have hereunto set my hand and seal at said county of Jackson the day and year first hereinbefore written.

My term of office expires on the 26th day of July, 1891.

[L. S.] AMZI D. LEECH,
*Notary Public, Jackson County, Mo.*

Filed for record and duly recorded in my office this 12th day of Feb'y, 1889, at 9 a. m.

R. T. HINDE, *Recorder,*
By W. H. WINSHIP, *Deputy.*

STATE OF MISSOURI, } ss:
*County of Jackson,* }

I, O. H. Queal, recorder of deeds within and for the county
54 of Jackson, aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the articles of association, acknowledgment and note of record thereon of the "Missouri, Kansas & Texas Trust Company" as the same appears of record in my office in Book Series B 330 page 579 and following.

In testimony whereof, I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 16th day of Sept. A. D. 1895.

O. H. QUEAL, *Recorder,*
By M. A. PURSLEY, *Deputy.*

*Def't's Ev.*

SEPTEMBER 18TH, 1895—10 o'clock a. m.

W. H. SQUIER, sworn on behalf of the defendant, on examination testifies as follows:

Direct examination.

By Mr. WHITE:

Q. Mr. Squier, you are the same W. H. Squier who testified in this matter now pending on the part of the plaintiff on the 17th day of September, are you not?

A. Yes, sir.

Q. Are you familiar with the rates of premiums of different leading companies of the United States for ten-year non-participating endowment policies?

A. Yes, sir; some of the companies.

Q. The same companies that you testified concerning the rate for ten-year-term non-participating policies yesterday?

A. Some of them, yes sir; not all.

Q. You are also familiar with the rates charged for that form of non-participating endowment policy by the Mutual Life Insurance Company of New York?

A. Yes, sir.

Q. That is the company, I believe, which you represent?

A. Yes, sir.

Q. Will you explain what is a ten-year non-participating endowment policy?

(Objected to as being irrelevant and immaterial.)

A. A ten-year endowment policy non-participating would be one issued payable at the end of ten years in cash to a man if he were living, or, in case of previous death, to the beneficiary of his estate, and would have no share in the profit earnings of the company during the ten years.

55 Q. He would get then—all his representative or beneficiary would get if he died within the ten years would be one thousand dollars on a one-thousand-dollar policy?

A. That's all.

Q. Will you give the rate of premium per thousand at the age of 28 and upwards to the age of 40 on such a policy in the Mutual Life Insurance Company of New York?

(Objected to as irrelevant and immaterial, there being nothing in the contract between plaintiff and the defendant in any way resembling any endowment insurance plan of premium or policy.)
(Exception.)

A. Age 28, $91.80; 29, $91.90; 30, $92; 31, $92.10; 32, $92.20; 33, $92.30; 34, $92.40; 35, $92.60; 36, $92.70; 37, $92.90; 38, $93.10; 39, $93.20; 40, $93.40.

Q. Was this the rate of premium in 1889 and 1890?

(Same objection.)
(Exception.)

A. So far as I know it was, yes, sir; it is the only rates the company has ever had to my knowledge.

Q. That is the published rates?

A. The published rates; that is, the Mutual Life Insurance Company of New York.

Q. How do other companies that you have knowledge of compare with the Mutual Life as to the amount of their charge for similar policies?

(Objected to as irrelevant and immaterial and on same grounds as specified above.)
(Exception.)

A. They are about the same—a trifle less, I should judge, than the other two I have at hand.

Q. That is, the Mutual Life is?

A. Yes, a trifle less.

Q. What are the other two that you speak of?

A. The Connecticut General of Hartford, Connecticut, and the Travelers' Life Insurance Company of Hartford, Connecticut.

(Same objection.)

(Exception.)

Q. There is no more than a dollar or two of difference in the charges of these companies?

56 A. No, sir, less than two dollars in both of these cases.

(All this evidence is objected to, covering the plan of proof of endowment rate.)

(Exception.)

Q. Were those rates in force in 1889 and 1890?

A. I think so; I couldn't swear as to that; I think they were.

Q. The book in which those rates are was published in 1892?

A. Yes, in 1892.

Q. And they were the rates in force at that time?

A. Yes, sir.

Q. In such rates as these is there any material change from one year to another?

A. No, nothing material.

Q. Do you know from your experience that the rates published are the rates on which the policies are issued?

A. Yes, sir.

Q. You get these comparative statistics from the same source that you got the (stasti-tics) that you gave yesterday, I suppose?

A. Yes, the same books.

Q. And the Mutual Life's from their own rate book?

A. Yes, from their authorized rates.

Q. Does the Mutual Life Insurance Company loan money?

A. Yes, sir, they do.

(Objected to as irrelevant and immaterial.)

(Exception.)

Q. If the Mutual Life Insurance Company loaned me one thousand dollars at ten per cent. per annum for ten years and if the company insured me at the age of 28 under a non-participating endowment policy of a thousand dollars for ten years, what would the two contracts cost me in cash per annum and how much in ten years?

(Objected to as irrelevant and immaterial, the contract between plaintiff and defendant not being in any respect a so-called endowment contract.)

(Exception.)

A. Well, the interest on such a contract as that would of course

be one hundred dollars a year and the premium for such an endowment policy $91.80 a year; the expense, then, for ten years would be $1,918, total.

57 Q. At the end of that period the principal would be paid up would it not, of the loan, and if those payments had been made regularly as per contract there would be nothing further due from the party insured to the company?

(Objection to all this evidence in reference to this matter already inquired about and being on this same line, as irrelevant and immaterial.)
(Exception.)

A. His payments under the insurance policy being completed and the policy paid for it would of course offset the loan and could be used in that way.

Q. So that in ten years for what he had received he would have paid out $1,918 in money at the rate of $191.80 a year?

(Objection.)
(Exception.)

A. Yes, sir.

Q. If, then, a party took a loan of $1,000 from the defendant in this case for ten years, agreeing to pay $180 per annum to the defendant and the defendant agreeing that if he should die at any time within ten years it would cancel the notes and mortgage given as evidence and as collateral to said debt, and that in case of payment of these sums—$180 a year,—as agreed, for the ten years the loan should be cancelled by payment, or a contract of similar effect to that; would not the party contracting with the company for the loan have actually at all times a position equivalent to that that he would have had under the contracts with the Mutual Life Company that you have referred to, and at a less figure than under those contracts with the Mutual Life, it being made, as I have suggested, at ten per cent. per annum for the loan?

(Objected to as irrelevant, immaterial and incompetent; that there is no foundation laid in the pleadings or testimony showing a state of facts similar to those suggested in the hypothetical statements by counsel in his question as a proper basis on which the proposed question could be answered; and for the further reason that it is not shown that the Mutual Life Insurance Company, of which the witness is an agent, issues or makes a contract in any way similar to or resembling the contract set forth in the pleadings in this action, or that they combine two contracts in one or in that

58 there is no specified price for premiums or no specified rate of interest set forth and that the contract is the best evidence of its legal effect.)
(Exception.)

A. I think it would.

Cross-examination.

By Mr. RICHARDS:

Q. Have you seen the contract entered into between the plaintiff and the Missouri, Kansas & Texas Trust Company defendant?

A. I have not.

Q. You say the Mutual Life Insurance Company makes loans?

A. Yes, sir.

Q. When they do, are you familiar with their custom and practice in making loans?

A. No, sir, only in a general way.

Q. Do they make loans when they have no insurance policy issued upon the life of the borrower?

A. I suppose so; in fact I know they do at certain times.

Q. Is it their custom to insist upon policies upon the life of the borrower?

A. I don't think so, no, sir.

Q. Are the two branches entirely separate,—the loan branch and the insurance branch?

A. Yes, sir.

Q. Do you know whether or not it is their custom to combine the two contracts in one?

A. I never saw such a contract.

Q. Did you ever hear of such a contract of theirs?

A. No, sir.

Q. Did you ever hear of such a contract at all?

A. Yes, I have heard of such a contract.

Q. You have heard that there was such a contract in the pending case?

A. Yes, and further than that that such contracts were issued by certain companies. I know that the Missouri, Kansas & Texas Trust Company have done business in that way.

Q. That is the only company that you have knowledge of that has done business in that way?

A. Yes.

Q. Do you know whether or not the Missouri, Kansas & Texas Trust Company in those contracts ever cause the rate of premium to be specified?

A. I do not.

59 Q. Or the rate of interest to be paid?

A. I do not; no, sir.

Q. Is it a fact, Mr. Squier, that the term endowment policy used in the life-insurance business always means that under the terms of the contract the money is paid to the beneficiary where the party insured is still alive?

A Yes, sir, it would be paid to him if he survives the term; in case of his prior death to the beneficiary.

Q. Does the ten-year non-participating term in insurance parlance imply any endowment plan?

(Objected to as immaterial, incompetent and irrelevant.)

(Exception.)

A. No, sir.
Q. How does the endowment rate of premium compare with the rates on the ten-year non-participating term?
A. They are higher.
Q. That is because the contract absolutely calls for the payment of the amount of the policy in a given term of years, is it not?
A. Yes.
Q. Without any uncertainty whatever?
A. No uncertainty.
Q. In case of death it is to be paid and in case of the rolling around of the years it is to be paid?
A. That is true.

W. H. SQUIER.

W. E. COVEY, sworn on behalf of the defendant, on examination testifies as follows:

Direct examination.

By Mr. WHITE:

Q. Mr. Covey, you are the same person, are you not, who took the stand for the plaintiff in this action yesterday and gave testimony at the request of Mr. Richards?
A. I am.
Q. Are you familiar with the rates of premium of any of the leading companies of the United States on what is known as the ten-year non-participating endowment policy?

(Objected to for the reason that it is irrelevant and immaterial.)
(Exception.)

A. In a general way.
Q. You have said that you are connected with the Equitable Life Assurance Society of the United States; do you know their
60 rate of premium per thousand for insurance at the age of 28 on the non-participating endowment plan?

(Objected to as incompetent, irrelevant and immaterial.)
(Exception.)

A. I don't, to give the exact figures.
Q. Well, you know approximately?
A. Yes, sir.
Q. It is more, is it not, as the age increases?
A. Yes, sir.
Q. Will you give the rate for the age of 28 for such a policy?

(It is understood that all evidence of the witness on the subject of the rate on any such plan called in insurance the endowment plan, or with reference to the terms of any such policy or contract is objected to on the part of the plaintiff as being irrelevant and immaterial under the issues.)
(Exception.)

A. For the age of 28 the rate of a ten-year non-participating endowment would be about $91.26.

Q. And at 31 years of age would be what?
A. $91.66.
Q. Are these within a dollar or two of about the rate of other companies for the same ages and engaged in the same business?
A. I think they are.
Q. Your knowledge of this plan and the terms is derived, I presume, from the same source that you testified your knowledge of the non-participating life-term policy was derived, yesterday?
A. Yes, sir.
Q. The publication of these rates is equally reliable, is it not, with the publication of the rates that you testified to yesterday?
A. Yes, sir.
Q Are the rates that you have sworn to about the same rates that were established in 1889 and 1890?
A. They are, or were in force in 1889 and 1890—not established then.
Q. Does the Equitable Life Assurance Society loan money?

(Objected to as irrelevant and immaterial.)
(Exception.)

A. They do under certain conditions.
Q. If the Equitable Life Assurance Society loaned me $1,000 at ten per cent. per annum for ten years and if the society in-
61 sured me at the age of 28 under a non-participating endowment policy of a thousand dollars for ten years, what would the two contracts cost me in cash per annum and how much in ten years?

(Objected to as irrelevant and immaterial under the issues and for the further reason that there is no similarity existing as between an endowment contract and the contract between the plaintiff and defendant in this case.)
(Exception.)

A. About $191 a year—a total of $1,910, not including interest.
Q. At the end of that period the principal would be paid up would it not, of the loan, and if these payments had been made regularly as per contract there would be nothing further due from the party insured to the company?

(Same objection.)
(Exception.)

A. No, that wouldn't be so; he simply would have paid his interest on his loan. He wouldn't have paid his loan.
Q. If he used the amount received to pay the loan, that would be the case, would it not?
A. Yes, sir.

(Same objection.)
(Exception.)

Q. So that in ten years he would have paid out $1,910 in money at the rate of $191 a year?
A. Yes, sir.

(Same objection.)
(Exception.)

Q. If, then, a party took a loan of $1,000 from the defendant in this case for ten years, agreeing to pay $180 per annum to the defendant and the defendant agreeing that if he should die at any time within ten years it would cancel the notes and mortgage given as evidence and as collateral to said debt, and that in case of payment of these sums—$180 a year—as agreed, for the ten years the loan should be cancelled by payment, or a contract of similar effect to that; would not the party contracting with the company for the loan have actually at all times a position equivalent to that that he would have had under the contracts with the Equitable
62 Life Assurance Society that you have referred to, and at a less figure than under those contracts with the Equitable Life, it being made, as I have suggested, at ten per cent. per annum for the loan?

(Objected to as irrelevant, immaterial and incompetent; that there is no foundation laid in the pleadings or testimony showing a state of facts similar to those suggested in the hypothetical statements by counsel in his question as a proper basis on which the proposed question could be answered; and for the further reason that it is not shown that the Equitable Life Assurance Society, of which the witness is an agent, issues or makes a contract in any way similar to or resembling the contract set forth in the pleadings in this action, or that they combine two contracts in one or in that there is no specified price for premiums or no specified rate of interest set forth and that the contract is the best evidence of its legal effect.)
(Exception.)

A. Practically so.

Cross-examined.

By Mr. RICHARDS:

Q. What do you mean in insurance language by an endowment policy, Mr. Covey?

A. A policy which contracts to pay the insured or his beneficiary the face of the policy at maturity or at the previous death of the insured.

Q. Then there is no uncertainty in such a policy as that as to the obligation of the company to pay over the full amount of the policy?

A. There is not.

Q. How does that differ from what you have described as the ten-year non-participating term plan?

A. It differs in all its main features.

Q. On the ten-year-term plan if the party lives out the term of the policy the company pays out nothing?

A. They do not.

Q. I understand you to say that the difference at the age of 28

between the two plans in the premium on $1,000 is the difference between $13.76 and $91.76 on the endowment plan?

A. Yes, sir.

Q. Have you seen the contract of the plaintiff with the defendant, The Missouri, Kansas & Texas Trust Company?

A. I have not.

Q. Do you know, Mr. Covey, of any life insurance com-
63 panies which also combine a loaning system whereby they incorporate their contract of the loan and the contract of the life insurance in one policy or contract?

A. I do not.

Q. Have you ever known of such a company?

A. I have not.

Q. Where the Equitable make those loans of money they are independent of the life insurance policy?

A. Entirely.

Q. And is that the case with all other life insurance companies of your knowledge that do a loaning business with their funds?

A. It is.

WM. E. COVEY.

WENDELL P. MOSHER, sworn on behalf of the defendant, on examination testifies as follows:

Direct examination.

By Mr. WHITE:

Q. What is your business and residence?

A. Business is insurance; residence is Duluth.

Q. What is your age?

A. Age, 35.

Q. The insurance includes life insurance?

A. All kinds of insurance.

Q. How long have you been engaged in life insurance?

A. 17 years.

Q. What life insurance companies do you represent at the present time?

A. The Travelers' of Hartford; never represented any other.

Q. How long have you reprsented them?

A. 17 years.

Q. How long in Duluth?

A. Six years.

Q. As their agent?

A. Yes, sir.

Q. In 1889 and 1890 did you represent the defendant in this case,—The Missouri, Kansas & Texas Trust Company,—and in what capacity?

A. I represented them as their agent here for making loans,—forwarding applications to them.

Q. Did you make the loan to the plaintiff in this case?

A. I did.

Q. You are acquainted then, probably, are you not, with the loan contract?

64 A. Why, I was acquainted with it. I haven't had anything to do with it since that time. I probably will be a little rusty on it.

Q. In general you know the provisions of the contracts?

A. Yes, sir.

Q. The amount of the loan in this case was what?

A. $2,000.

Q. The amount received by the plaintiff?

A. Well, as I remember it, it was $2,000. He paid his first payment when he was given the money.

Q. How much was his first payment?

A. $30.

Q. Does the Travelers' Insurance Company do a loaning business?

(Objected to as irrelevant and immaterial.)
(Exception.)

A. They do, yes, sir.

Q. It also does a life-insurance business?

A. Yes, sir.

Q. In the latter business does it issue what are known as non-participating endowment policies?

(Objected to as irrelevant and immaterial.)
(Exception.)

A. Yes, sir.

Q. Do you know the rates that are charged by it therefor?

A. I do.

(Same objection.)
(Exception.)

Q. Are these substantially the same rates that have been charged by it for the last ten years?

A. Yes, sir.

(It is understood and agreed that the objection of the plaintiff's counsel shall extend to all testimony adduced from this witness having a reference to or based upon a comparison of the endowment plan of insurance with that existing in the contract in this case as being irrelevant and immaterial.)
(Exception.)

Q. The amount charged in each case for an endowment policy is greater as the age increases, is it not?

A. Yes.

65 Q. Will you give me the amount of charge per thousand for such a policy for a term of ten years at the age of 28?

A. $92.45 per thousand per year for ten years.

Q. Do you know about how that compares with the rates charged by other companies for the same class of insurance?

A. Being non-participating it is from 20 per cent. to 30 per cent. lower than companies selling participating insurance.

Q. But for non-participating it is substantially the same?

A. Substantially the same. Practically all companies are selling participating insurance.

Q. If the Travelers' Insurance Company loaned to an applicant $1,000, at ten per cent. per annum interest for ten years and at the same time issued to the same person a non-participating endowment policy of insurance for the same period and amount, what would the cost per annum therefor be and what the total amount?

(Objected to as irrelevant and immaterial under the issues, and for the further reason that there is no similarity existing as between an endowment contract and the contract between the plaintiff and defendant in this case.)

(Exception.)

A. At age 28 it would be $192.45 per year for ten years—$1,924.50 total. That is, of course, to say nothing about the commission, as agent for working the loan, of three per cent.

Q. Did the plaintiff in this case pay you any commission for obtaining the loan?

A. No, sir; the Missouri, Kansas & Texas Trust Company paid me the commission.

Q. As a matter of fact, taking those contracts suggested with the Travelers' Insurance Company—the endowment insurance and the ten per cent. loan—and comparing the same as far as the borrower is concerned with the contract between the plaintiff and the defendant in the case at bar, in which plaintiff pays defendant $180 per year per $1,000, for the benefits received, are not the positions of the borrower in the two cases at all times during the life of the loan, providing the payments are made as per contract, exactly identical and at a less expense in the case of the contract between the plaintiff and the defendant than in the other case?

(Objected to as incompetent, irrelevant and immaterial, and further, the witness has not shown himself competent to speak
66 from actual knowledge as to the particular contract entered into in the case between the plaintiff and the defendant, and the exact terms thereof not indicated in the question asked. To the objection of counsel for the plaintiff to the previous question is added the further objection that the question assumes that the contract between the plaintiff and the defendant is on the endowment plan, which is not the case, and involves the opinion of the witness as to the legal effect of a written contract with which he does not show himself to be familiar.)

(Exception.)

A. I think they are identical. I made use of the statement at the time of making loans that it was in fact the giving of the avails of a policy immediately on the contract being closed instead of at the end of the ten-year period.

Cross-examination.

By Mr. RICHARDS:

Q. Do you know what is meant in insurance language by the expression non-participating ten-year-term plan, Mr. Mosher?

A. Yes, sir.

(Objected to as not proper cross-examination.)
(Exception.)

Q. At the age of 28 what is the rate of premium of your company on that plan—non-participating ten-year term?

(Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.)
(Exception.)

A. We have no such plan.

Q. What is the meaning in insurance language of the expression endowment plan?

A. That a certain sum of money will be turned over to the policy-holder at a stated time if in the meantime he has made the certain payments according to the manner of the company.

Q. In all endowment policies the obligation of the company to pay the face of the policy is fixed and certain under all conditions?

A. At the end of the period.

Q. If the insured dies his estate gets the money and if he lives he gets it?

A. Yes, sir.

67 Q. Do you know what the ten-year non-participating term plan is?

A. Yes, sir.

Q. On that plan if the party lives there is no money paid by the company to him or to the beneficiary named in the policy?

A. No, sir.

(Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.)
(Exception.)

Q. In that case the premium charged by the company is small in proportion to the rate of premium charged on the endowment plan, is it not?

(Same objection.)
(Exception.)

A. Yes, sir.

Q. Do you know what the rates of premium on the ten-year non-participating plan are at the age of 28?

A. I do not.

Q. Is it true that there is a very marked and extraordinary difference between the two plans of insurance?

A. There is a marked difference; not extraordinary, considering what each plan pretends to do.

Q. I will ask you to explain the two plans?

(Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.)
(Exception.)

A. The endowment plan agrees to pay to a man a certain sum at the end of a term of years or in case of his prior death. The other plan simply agrees to cover his beneficiary during that ten years only.

Q. No money whatever is paid if he lives out the term?

A. No.

Q. Do you say that you are familiar with the terms of the contract entered into between the plaintiff and the defendant in this case?

A. Yes, sir.

Q. I will ask you if in your opinion as a life-insurance agent that is an endowment plan insurance policy?

(Objected to as incompetent and immaterial.)
(Exception.)

A. The contract says nothing about endowment insurance. It doesn't pretend to be such.

68 Q. Do you mean that it doesn't pretend to be an insurance policy, or doesn't pretend to be an endowment contract?

A. The word insurance is not mentioned in the contract, so you are asking me if a cat is a dog.

Q. Do you mean to say, then, that this plan of contract is not an endowment plan insurance policy?

A. It is not an insurance policy.

(Plaintiff moves to strike out the last answer as not responsive.)
(Exception.)

Q. Consequently cannot be an endowment plan insurance policy?

A. No. In effect it is endowment. The result to the party borrowing is the same as under an endowment policy.

(Plaintiff moves to strike out last answer as not responsive to the question.)
(Exception.)

WENDELL P. MOSHER.

Continued until ten o'clock a. m., September 19th, 1895.

United States Circuit Court, Fifth Division, District of Minnesota.

TH. M. KRUMSEIG & LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY *et al.*, Defendants.

In the above-entitled matter it is hereby stipulated that the testimony of the complainant herein be taken before Clarence R. Smith at his office in the city of Duluth, Minnesota, on the 16th day of September, 1895 to be commenced at 10 o'clock a. m. and to con-

tinue, by adjournments from day to day if necessary until closed; the said Clarence R. Smith to be examiner of the court the same as if duly named as such by the clerk thereof; and it is agreed that defendant shall at said time produce to be used as evidence for the complainant- if desired, and subject to all legal objections thereto on part of defendant, the written application for a loan made on the part of the plaintiffs or either of them to defendant in pursuance to which the loan, secured by the mortgage in the complaint described, was made by defendant; and also a duly certified copy of the articles of incorporation of the said defendant M. K. & T. Tr. Co., as existing when the contract described in the pleadings herein was made; and it is further stipulated said copies shall be treated as originals for said purposes of evidence; and it is agreed that
69 the evidence desired by defendants in said action shall be taken after completion of plaintiffs' evidence in time for a hearing herein before the court at the October term thereof in the year 1895, if plaintiff- shall have finished on Sept. 19th, 1895, and that said cause shall be then tried.

Dated, Sept. 6th, 1895.

J. B. RICHARDS,
*Plaintiff's Attorney.*
WM. C. WHITE,
*Defendant's Attorney.*

The United States of America for the Fifth Division, District of Minnesota.

I, Clarence R. Smith, examiner of the court, hereby certify that the above witnesses, Theodore M. Krumseig, W. H. Squier, William E. Covey and W. P. Mosher, were by plaintiffs' counsel by consent of defendant's counsel duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were reduced to shorthand writing by me in the presence of the said witnesses respectively, and thereafter to longhand by agreement of said counsel, and when completed read over by said witnesses respectively, and subscribed by them in my presence and in the presence of such of the parties and counsel as attended; that said depositions were taken pursuant to the annexed stipulation at my office at Duluth, beginning on the 16th day of September, 1895, and continuing from day to day as set forth; that the parties were represented at the taking of said deposition by their respective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand this 4th day of October, 1895.

CLARENCE R. SMITH,
*Examiner of the Court.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG & LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

It is hereby stipulated, by and between the parties plain-
70 tiff and defendant in the above-entitled action that the deposition and testimony of John B. Lunger and others residing at Newark in the State of New Jersey, witnesses on behalf of said defendant shall be taken by and before any notary public residing at Newark, New Jersey, whose official character as such notary public shall be sufficiently proven by his official seal and an impression thereof affixed to or stamped upon his return hereto; and such notary public is hereby agreed upon and appointed to take the deposition- of said witnesses, at 9 o'clock a. m., on Monday, September 16th, 1895, at the office of Prudential Insurance Co. of North America, in Newark, New Jersey; and said parties hereby waive any and all objections to said notary public, and waive the issuing of any commission from said court herein, and hereby agree that said deposition- of said witnesses shall have the same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or the rules of court for the taking of depositions; but said parties reserve to themselves the right to object to the competency and admissibility of said testimony interrogatories and cross-interrogatories, and to any of the same, and to any of the answers thereto respectively, in like manner and upon the same grounds as if said witnesses were present and orally examined in open court upon the trial of this cause which is at issue and in said court depending.

And it is further stipulated that said depositions may be adjourned from day to day until the same are fully completed. And it is agreed that the deposition of the Prudential Life Insurance Company taken July 29th, 1895, at Newark, N. J. at the instance of the plaintiff- shall also be decreed to have been taken under the above-mentioned terms, the taking of same before filing of replication being waived.

Dated, Sept. 5th, 1895.

J. B. RICHARDS,
*Attorney for Plaintiff.*
WM. C. WHITE,
*Attorney for Defendant.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Defendant.

Deposition taken in the above-stated cause pursuant to stipulation dated the fifth day of September, 1895, signed by J. B.
71 Richards, attorney for plaintiff-, and William C. White, attorney for defendant, before J. R. Salmon, a notary public, residing at Newark, in the State of New Jersey, at the office of the Prudential Insurance Company of North America, in Newark, New Jersey, commencing on the 16th day of September, 1895, at 9.30 o'clock a. m., in the presence of Thomas N. McCarter, Jr., counsel for defendant.

JOHN B. LUNGER, being by me first duly sworn on his oath according to law, to tell the truth, the whole truth, and nothing but the truth, relative to the cause specified in said stipulation, did depose and say as follows:

Direct examination.

By Mr. MCCARTER:

Q. State your name, age, residence and occupation?
A. John B. Lunger; age, 31 years; residence, Summit, New Jersey; occupation, manager of the ordinary branch and actuary of the Prudential Insurance Company.

The further taking of this deposition was adjourned by me until Tuesday, September 17th, at 9.30 o'clock a. m., to be continued at the same place.

____ ____,
*Notary Public of New Jersey.*

SEPTEMBER 17TH, 1895.

Continuation of examination, pursuant to adjournment, at the place and in the presence of the parties as before.

JOHN B. LUNGER resumed.

Q. How many years' experience have you had as actuary of the Prudential Insurance Company?
A. About fourteen years.
Q. Are you a member of the American Society of Actuaries?
A. I am.
Q. By reason of the nature of your duties, are you familiar with the laws of interest and the various (principals) which enter into the construction of life-insurance premiums?
A. Yes, sir; I am.
Q. Are you familiar with the department of business carried on by the Missouri, Kansas and Texas Trust Company, which grants a loan to the borrower for a period of ten years to be paid in monthly

installments, or to be cancelled at his death during the period for which it is rendered?

A. I am familiar with the company's plan, and the contract
72 between the company and the borrower, but not with the manner in which the details of the transaction are handled in the office of the M. K. & T. Trust Company.

Q. You are, however, familiar with the general principles of this line of business?

A. I am.

Q. I show you one of the usual forms of contract entered into by this company, and ask you if you have examined either it or one like it?

A. I have examined this particular contract.

Q. Have you also made any examination as to the rates charged by the M. K. & T. for entering into such contract with the borrower?

A. I have.

Q. Will you now state the nature of this contract?

A. To my mind, it transfers certain property to the trust company as security for a loan of $2,000 to the borrower, such loan, with charges, to be repaid to the trust company in monthly installments of thirty dollars each, extending over a period of ten years; there is a special proviso on the part of the trust company that in case of the death of the borrower prior to the repayment of the loan all unpaid installments shall be cancelled and the obligations declared void. In brief, the contract is a combination of a mortgage loan, payable in installments, and a life-insurance policy.

Q. Do you know of any other companies making contracts of a similar nature?

A. Yes.

Q. Have you had any personal experience in computing rates charged by any of these other companies doing this same business?

A. In the case of one company; yes.

Q. What company is that?

A. The South Jersey Finance Company of Camden, New Jersey.

Q. Did you compute the rates under which that company operates?

A. I did.

Q. Are you familiar with the rates charged by a company in Pennsylvania doing the same business, called the United Security Life Insurance and Trust Company of Pennsylvania?

A. I am.

Q. At the time you became familiar with the rates of the United Security Life Insurance and Trust Company, and made up the rates of the South Jersey Finance Company, were you familiar with the rates of the M. K. & T. Company?

A. Only in a general way; I did not know the exact charges.

73 Q. Have you recently made any examination of the rates charged for such a contract by the M., K. & T. Company?

A. I have carefully analyzed the rate.

Q. So that you are now familiar with the rates charged by the M. K. & T. Company?

A. I am.

Q. As well as the rates charged by the other leading companies in the country doing the same business of which you have knowledge?

A. Yes, sir.

Q. Are you familiar with the legal rate of interest allowed in the States of New Jersey, Pennsylvania and Minnesota?

A. I am.

Q. What are they?

A. Six per cent. in New Jersey and Pennsylvania, ten per cent. in Minnesota.

Q. Bearing in mind then, the difference in the rate of interest allowed in said States, will you state whether the charge made by the M. K. — T. Trust Company for its contracts within the State of Minnesota are relatively greater than the rates charged for similar contracts by the South Jersey Finance Company of Camden, and the United Security Life Insurance and Trust Company, within the States of New Jersey and Pennsylvania?

Objected to by pl'ff as irrelevant and immaterial, and assumes facts not proven.

A. They are not. The advantage is in favor of the M. K. & T. Trust Company.

Q. Now, Mr. Lunger, the company with which you are connected has an ordinary branch, has it not?

A. Yes, sir.

Q. And will issue life and endowment policies in such branch?

A. It will.

Q. Has your company also a bond and mortgage department for purposes of investment?

A. It has.

Q. Would it be possible for a person to borrow on proper security $1,000 from your company through its bond and mortgage department, and at the same time take out a ten-year endowment policy in the ordinary branch, with the idea of using the proceeds of the ten-year endowment policy to pay off the load at the end of ten years?

A. It would, if the person was in good health.

74 Q. What is the very lowest charge in your ordinary branch for a ten-year endowment policy, age 28 years, for $2,000?

A. At age of 28 our rate for a $2,000 policy without profits would be $185.62 annually, or $49.20 quarterly.

Q. You mean by without profits a policy which will pay $1,000 at the end of ten years, and no more?

A. I do.

Q. If these installments were payable monthly, would or would not the rate be increased over these quarterly payments?

A. They would be increased.

Q. Now in case a party should borrow $2,000 from your company

through its bond and mortgage department, and at the same time take out a ten-year endowment policy through your ordinary branch, with a quarterly premium of $49.20, what would such party pay your company per annum, assuming that the mortgage is subject to 10 per cent. interest?

(Objected to as irrelevant and immaterial, contract in question not being an endowment contract.)

A. He would pay us $200 per annum interest through our bond and mortgage department, and $196.80 in premiums through our ordinary branch, making a total of $396.80.

Q. What are the annual rates of the M. K. & T. for a loan of $2,000 for ten years, payable in monthly installments?

A. The annual installments amount to $360 per year at all ages between twenty-five and forty-five.

Q. Has your company any contract with the M. K. & T. Trust Company to carry the insurance part of the M. K. & T. Trust Company's contract with its borrowers?

A. It has.

Q. Are you making further similar contracts?

A. We have made several of such contracts, but have now discontinued entering into such arrangements.

Q. Why?

A. Because we have not received a sufficient line of business through such contracts to justify us in issuing the policies at the rate which we charge.

Q. Was one of the considerations for your company entering into this contract the prospect of a large volume of business thereunder?

A. It was.

Q. Is the rate which you are charging the M. K. & T. an average rate or an unusually low one?

A. It is a low rate.

75 Q. Could an individual obtain a policy at the same rate from your company?

A. No.

Q. Do I understand you to say that it is not the intention of the company to make any more similar contracts to this one at the same rate?

A. We have discontinued making such contracts, and are not likely to change our decision, although we reserve the right to do so.

Q. Do you collect the premiums on the policies which you issued to the M. K. & T., and do you assume any risk in connection therewith?

A. We do not.

Q. Is that one reason why you quote them the low rate?

A. It is.

Q. Were you influenced to quote a low rate by the fact that you expected to secure through the trust company an unusually desirable class of policy-holders?

A. We were.

Testimony closed. JOHN B. LUNGER.

STATE OF NEW JERSEY, }
*County of Essex,* } ss:

Be it known that I took the annexed deposition of John B. Lunger, pursuant to the annexed stipulation; that I was then and there a notary public in and for said county and State; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that the witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed stipulation; that the testimony of the witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the defendant by Thomas N. McCarter, Jr., no one appearing for the plaintiff.

Witness my hand and seal this 17th day of September, 1895.

[NOTARIAL SEAL.] J. R. SALMON,
*Notary Public, of New Jersey.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, }
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. }

It is hereby stipulated by and between the parties plaintiff
76 and defendant in the above-entitled action that the deposition- and testimony of Francis H. Hemperly and William S. Taylor, and others, residing at Philadelphia, in the State of Pennsylvania, witnesses on behalf of said defendant, shall be taken by and before any notary public residing at Philadelphia, Pennsylvania, whose official character as such notary public shall be sufficiently proven by his official seal and an impression thereof affixed to or stamped upon his return hereto; and such notary public is hereby agreed upon and appointed to take the deposition of said witnesses, at 9 o'clock a. m., on Monday, September 16th, 1895, at the office of Missouri, Kansas and Texas Trust Co., at 400 Chestnut street, Philadelphia, Pennsylvania; and said parties hereby waive any and all objections to said notary public, and waive the issuing of any commission from said court herein, and hereby agree that said deposition- of said witnesses shall have the same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or the rules of court for the taking of depositions; but said parties reserve to themselves the right to object to the competency and admissibility of said testimony, interrogatories and cross-interrogatories, and to any of the same, and to any of the answers thereto respectively, in like manner and upon the same grounds as if said witnesses were present and orally examined in open court upon the trial of this cause which is at issue and in said court depending.

And it is further stipulated that said depositions may be ad-

journed from day to day until the same are fully completed. And it is agreed that the deposition of the Prudential Life Insurance Company taken July 29th, 1895 at Newark, N. J. at the instance of the plaintiff shall also be decreed to have been taken under the above-mentioned terms, the taking of same before filing of replication being waived.

Dated Sept. 5th, 1895.

J. B. RICHARDS,
*Attorney for Plaintiff.*
WM. C. WHITE,
*Attorney for Defendant.*

U. S. C. C., (*Di*fth) Division, Dis. of Minn.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
THE MISSOURI, KANSAS & TEXAS TRUST CO., Defendants.

77 Deposition of Francis H. Hemperly, residing at Philadelphia, in the State of Pennsylvania, a witness called on behalf of the said defendant in accordance with the stipulation duly filed in said cause.

FRANCIS H. HEMPERLY, being duly sworn according to law, deposes and says:

By Mr. LEX:

Q. Please give me your name, age, residence and occupation?

A. My name is Francis H. Hemperly, I am fifty-two years of age, residence Philadelphia, my occupation is that of actuary for the United Security, Life Insurance & Trust Company.

Q. What experience have you had as actuary?

A. I have held that position since the organization of the company, some eight years.

Q. Are you associated with any organization of actuaries and have you had any experience as an expert in matters in which an actuary was necessary?

A. I am a member of the Actuarial Society of America and have had the usual experience of an actuary in connection with the business of the company.

Q. Have you ever been called upon to testify as such in suits in this State, New Jersey, the District of Columbia or elsewhere?

A. I have; yes, sir.

Q. Have you or have you not any knowledge as an actuary of the plan of the Missouri, Kansas & Texas Trust Company under which the loan in this case was made to Theodore M. Krumseig and wife?

A. I have.

Q. In connection with that have you examined the form of note and the mortgage, which two papers contain the contract made between the plaintiffs and the Missouri, Kansas & Texas Trust Company?

A. Yes, sir; I have.

Q. I would like you, in your own way, as an expert actuary to explain the manner in which the plaintiffs obtained their money, the character of the contract so far as it relates to the installments which they were to pay, and the time during which the contract was to run, and then I would like you to dissect the rate which was charged so as to be able to state whether or not any part of the contract in any of its aspects whatever is tainted with usury?

Objected to as incompetent, calling for witness' construction of written contract, and for his opinion as to whether it is usurious, and moved to strike out answer.

78 A. You ask me to analyze the installments of premiums charged by the Missouri, Kansas & Texas Trust Company upon moneys advanced by them with a life-insurance clause or guarantee of cancellation of the debt remaining unpaid in case of death, with a view to ascertaining whether these charges can be properly considered as exorbitant, taking into consideration the laws of Minnesota, allowing a charge of ten per cent. interest on the money advanced.

On the ten-year plan the rates of the company as given me upon an advance of $2,000 are $360 a year, payable monthly, at $30 per month, making a total of $3,600 for the entire time which the insured would pay the company should he live to the end of the term, or $1,600 over and above the amount received by him in advance. In order to simplify calculations, we will reduce these figures to a basis of $1,000, making the installment $180 a year, or $15 a month.

First I would call attention to the fact that had this borrower taken out a policy of insurance upon an endowment plan, which would give his heirs $1,000 in case of death inside of ten years, or which would pay him $1,000 at the end of ten years if he survived and kept up the premiums, he would have had to pay for the same at the age of twenty-eight years, paying quarterly, the sum of $107.80 a year, according to the tables of a first-class company lying before me. I refer to the Penn Mutual Life Insurance Company. This would leave the sum of $72.20 with which to procure the money in advance elsewhere if he desired to do so, or a fraction over seven per cent., but as these are participating insurance rates, upon which there would probably be a dividend, let us see what regular stock rates with no dividends would cost. According to the tables of another first-class company, the National Life Insurance Company of Vermont, and I take the rates of this company because they are the lowest stock rates with which I am familiar, the cost would be, payable quarterly, $91.76 a year. This would leave $88.24, or a trifle over eight and eight-tenths per cent. as interest. I think the Missouri, Kansas & Texas Trust Company is entitled to charge these regular endowment insurance rates in addition to the legal rate of interest for the advance of the money, because the company has to take greater risks than ordinary insurance companies in that the money is paid in advance while the insured has greater security than is enjoyed by the ordinary insured for the same

reason, as no possible financial misfortune which may happen to the company can affect him or deprive him of the privileges of his contract. I consider that the money advanced to the borrower is in the nature of a permanent investment until the end of the contract, and that the life-insurance risk is carried upon the whole amount so invested while the install-
79 ments or premiums as they are paid in provide an accumulating reserve or sinking fund which is augmented by an increased amount each year until the expiration of the term, when it must equal the original amount advanced. This reserve is an offset to the amount at risk, and in case the insured desires to terminate his contract, it furnishes a basis for calculation to determine how much he must pay back to the company on account of the money advanced. Ordinarily, life insurance companies allow the insured the legal insurance reserve, which has been calculated upon the actuary's experience of mortality at a four per cent. or four and a half per cent. rate of interest. When forfeiture of the policy is made the reserve is reduced by (*form*) fifteen to thirty per cent. as a surrender charge to provide for the injury done the company by reason of the withdrawal of the insured, who thereby weakens the company not only financially, but also physically, in that he reduces the standard of average health by withdrawing.

Q. I would now like you to apply the principles which you have just stated and the formula which you have just given to the present case, the facts of which I understand to be as follows: That Theodore M. Krumseig being of the age of twenty-eight years borrowed from the Missouri, Kansas & Texas Trust Company $2,000, which were paid to him for ten years, to be repaid in monthly installments, for which they took his notes and mortgage to secure the same, and under the usual form of contract agreed that in case the plaintiff should die at any time within ten years that the notes remaining unpaid should be cancelled and the mortgage satisfied, or if he should pay all the notes according to the terms of the contract, when that had been done the mortgage should be satisfied. Please also bear in mind that, as I understand it, under the law of Minnesota a lender of money is entitled to charge as interest ten per cent. per annum, but if more than that is charged the whole of the principal and interest is forfeited. I would like to know first whether the character of the charge which is made by the defendant company for the cancellation of the debt in the case of Krumseig's death is fair and reasonable. Then I would like you to explain the contract and compare the plan under which the contract was made with Krumseig with the plan of any other company which you know of that makes similar loans?

Question objected to as incompetent, calling for witness' construction and opinion as to the legal effect of the written contract.

A. In the case of the plaintiff referred to, Krumseig having received $2,000 in advance under this plan, with the agreement on the part of the defendant company that in case he should die
80 during the term, not in default, they would cancel all their claims upon him, the application of the principles which I

have tried to state, would show very clearly that upon the payment of the premium installments agreed upon, viz., $360 per year, or $30 per month, he would be entitled to the credit at the end of the several years of the cumulating legal insurance reserve, and that this reserve at the end of ten years, with the conditions of the contract complied with, would amount to $2,000, which would make good to the company the amount of their claim against him by reason of the $2,000 advanced. It is fair that the defendant company should be entitled in making up an analysis of the installments to the credit of the ordinary endowment insurance premium, which, in the case of Mr. Krumseig, would be, with a stock rate and no dividends, as set forth in the tables of the National Life of Vermont, which is a first-class company with a very low rate, $183.52 per year, if paid quarterly. This company has no monthly rates, which would probably increase the charge. The defendant company, therefore, being entitled to the sum of $183.52 with which to cover that which is ordinarily understood by the life-insurance risk, and in addition thereto the cumulation of a sum to be paid at the end of the term is also entitled to the legal rate of interest for the use of its money, which is advanced at the beginning of the term, in this case $2,000, the interest on which would be at ten per cent. $200, and which added to the $183.52 would, in my judgment, have kept the company free from the charge of usury had their premium been $383.52, but, in point of fact, the premium being only $360, a simple calculation will show that the company is $23.52 within the limit where they would reach and be subject to a charge of more than the legal rate of interest.

Or, to take it in a slightly different form, the company charging $360 for the aggregate of endowment insurance and interest, and the endowment insurance rate being $183.52, a simple calculation will show that the difference, which is $176.48, being the amount properly chargeable as interest on the $2,000 for one year, would show $88.24 as the rate on $1,000 for one year, or a rate of interest of a trifle under nine per cent., viz., eight per cent. and eight twenty-four one-thousandths.

Motion by plaintiffs to strike out answer as incompetent, irrelevant and immaterial.

Q. I understand that the calculation which you have just made is based upon the rates of the National Life Insurance Company of Vermont. Am I right?

A. Yes, sir.

Q. If the same calculation were made by you based upon the rates of any of the following-named companies, would or
81 would not the rate of interest paid by the borrower in this case be less than the 8.8 per cent. calculated by you? The names of these companies are, the Provident Life & Trust Company, the Ætna Insurance Company, the Travelers' Insurance Company, the New York Life and the Prudential Insurance Company of America.

Question objected to by plaintiffs as incompetent, calling for a

direct opinion of the witness as to the legal effect of the written contract.

A. To the best of my knowledge and belief, from my general knowledge of the rates charged by the companies referred to, I answer that the rate of interest would be less.

Q. Would it, in any event, reach ten per cent. under the rate of any company that you know of?

A. It would not.

Q. In speaking of the payment of premiums how do you assume that they are paid and what is the custom as to their payment in regard to the calculations?

A. They are always payable in advance.

Q. So that if any borrower should at the time of receiving the amount which he borrowed pay his premium in advance, or, rather, it should be deducted at that time from the amount loaned to him, it would make no difference in any of the calculations which you have made?

A. None whatever. It is assumed that the money is paid to the man and that he pays the company his installments.

Q. In speaking of life insurance and in the calculations which you make this payment is called what?

A. It is called premiums.

Q. And in contracts which are not life-insurance contracts, but those in question in this case, you call the payments what?

A. We call them installments.

Q. Having investigated this case, in your opinion as an expert, can it be held that the charge for the risk of the borrower's death is so (ex*hor*bi'tant) that it could be held as a device to cover usury?

Objected to as incompetent on grounds above stated.

A. I should most positively say no.

Q. Is the charge for the risk which the defendant company has taken in this case unreasonable or unusual?

Objected to as incompetent.

A. It is not.

82 Q. Has there been, in your opinion, any unreasonable or excessive charge under the contract made with the defendant company to cancel the debt in case of death or at the end of the period?

Same objection as above.

A. I think not.

Q. From the testimony which you have given am I right in understanding that the contract between the plaintiffs and defendant company combines the features and purposes of a straight ten-year loan and a ten years' endowment policy?

Objected to as incompetent. (Court alone decides upon nature of the contract.)

A. I have so regarded it, and I am persuaded that the company

is entitled, in making an analysis of its charges, to hold that ground.

Q. Such being the case, will you again state the similarity between the contract in question in this case and make comparison between it and a straight loan and an endowment policy? And after that state which of them is better for the borrower, considering in connection with this of course the peculiar nature of this contract, especially the fact that the borrower gets the money paid to him in advance and that the mortgage is canceled in the event of his death before the expiration of the term of contract.

Objected to as immaterial and irrelevant and incompetent, and especially that it assumes what is not the fact, that the borrower gets the money "paid" to him in advance. It is loaned not paid, and that the contract is one of endowment, which is not the case.

A. The figures which I have given in the former part of my testimony show conclusively that the combined rate of ten per cent. interest on a straight loan and the lowest stock rate of endowment insurance exceed the rate charged by this company, at the age of twenty-eight, by $23.52 on $2,000, or $11.76 per thousand. So that the insuring borrower under the plan of the company makes a saving over the cost if he secured the money as stated, by separating his insurance and taking it elsewhere, of $11.76 per year per $1,000. But I consider this by no means the greatest of the advantages which he secures, because of the fact that he runs no possible risk of the solvency of the insurance company at the end of his term, which experience has taught, even in the case of supposed safe and satisfactory companies, is a risk, and, which, like all other risks, has a money value when insured against, as in this case.

83 Q. What have you to say about the fact that under the contract in the present case in the event of the death of the borrower the mortgage is satisfied upon receiving proofs of death, as compared with the fact that in case of life insurance where premiums are paid monthly, as the installments are in this case, the balance of the monthly premiums due to complete the current year are deducted out of the money due the heirs?

A. It is the usual practice in insurance circles where premiums are paid at intervals of less than a year, in case of death to charge the heirs of the insured for the remaining unpaid portion of the full year premium, but, as I understand, in this case upon the death of the insured not in arrears or default all of the unpaid notes or claims by the company are satisfied.

Q. I understand you then to favor this contract as being better for the borrower than a straight loan or endowment policy either?

A. I certainly do, and, if I might be permitted to suggest that the company is thereby entitled to charge considerably more than the ordinary insurance premiums by reason of the fact that the quality of the protection afforded by it is superior, and not only so, but the company itself, when called upon to collect its risk by reason of default of the insured, has placed itself in a position where it is liable

to be put to additional expense, and where its money cannot be regained as quick as in other cases.

Q. What is the rate of interest in the State of Pennsylvania?

A. Six per cent.

Q. Are you familiar with the plan of any company in this State which makes similar loans to the one under discussion in this case?

A. The company with which I am connected as actuary does a business of a similar character. The name of that company is the United Security Life Insurance & Trust Company of Pennsylvania.

Q. Please briefly compare the plan of that company with the plan under the contract in this case as affecting the borrower in this case?

Objected to by plaintiff as immaterial and irrelevant.

A. The principal difference that strikes me at this moment is that the United Security Company would charge more for a man aged thirty-five years than for one aged twenty-five; in other words, it has a sliding scale of charges according to age from the youngest to the oldest within its limits, whereas, the defendant company
84 in the case appears to have the same charge between the ages of twenty-five and forty-five, but as the calculation which I have made are based upon the younger ages, it would seem that the older ages would be particularly favored in the Missouri, Kansas & Texas Trust Company.

(Motion by plaintiff to strike out the rest of answer as incompetent.)

I might also say that as the legal rate of interest in Pennsylvania is six per cent. and the charges of the United Security Company have been adjusted and decided and held by our courts in cases where the issue has been raised to be free from any taint of usury, that a comparison between the rates of the United Security Company and the Missouri, Kansas & Texas Trust Company shows that while the United Security Company charges upon a risk at that age, twenty-eight, for the advance of $1,000, payable monthly, upon a ten years' term the sum of $157.68 a year, the Missouri, Kansas & Texas Trust Company charges under similar circumstances the sum of $180 a year, or only $22.32 more than is charged by the United Security Company, and as the legal rate of interest in Minnesota is four per cent. greater than in Pennsylvania, it would seem that a difference of $40 would not be excessive. So that as the actual difference is but $22.32, it is fair to assume that the company is well within the limit allowed by law and that there is no usurious charge.

Q. I understand you, therefore, that with the exception of the peculiar facts you have just referred to, the contracts of the Missouri, Kansas & Texas Trust Company of Kansas City, Missouri, and the United Security Life Insurance & Trust Company of Philadelphia are identical?

(Objected to as incompetent, contract itself is best evidence.)

A. Practically they are.

Q. Do you know whether or not the plan of the United Security Life Insurance & Trust Company has come under judicial notice in any suits?

A. It has.

Q. What are they?

(Objected to by plaintiff as calling for incompetent evidence.)

A. I have in mind a case of James Neil, whose mortgage was foreclosed by the United Security Life Insurance & Trust Company in the chancery court of New Jersey. In that case the defendant's answer raised the very same questions that have been raised in this case, and a decision was given in favor of the United Security Life Insurance & Trust Company by the Hon. A. V. Van Fleet,
85 one of the vice-chancellors of the State of New Jersey, his decision having been rendered at Newark on March 15, 1892. Subsequently he made a decree of foreclosure in accordance with his views as expressed. He flatly decided that there was no usurious feature of the contract. I have before me a transcript of the shorthand notes of the testimony and charge, which are at your disposal at any time.

There was also a case tried and decided in the District of Columbia somewhat similar to the present case, the difference being that in that the contract had no feature whereby the mortgage was to be satisfied upon the death of the borrower. The question of usury, however, arose and I gave my testimony as an expert in that case before Mr. Justice Bingham. That case was tried in the supreme court of the District of Columbia and was between John Waggaman, plaintiff, and The United Security Life Insurance and Trust Company of Pennsylvania, defendant. Mr. Justice Bingham rendered a written opinion on January 4, 1894. I have a copy of that before me and it is at your service at any time. Judge Bingham also decided that there was no usurious feature to the contract.

(Motion to strike out answer as incompetent.)

Q. As matter of interest, and it might have a bearing upon what you have just stated, are you able to tell me what the Revised Statute of the District of Columbia provides in reference to usurious contracts?

A. Yes, sir. Paragraph 714 provides that in all contracts made it shall be lawful for the parties to stipulate or agree in writing that the rate of ten per centum per annum, or any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned or in any manner due or owing from any person or corporation in the District?

Q. Mr. Hemperly, if any other facts occur to you tending to show the fairness and advantages of this contract to the borrower, please state them in your own way.

A. I desire to add that while I am firmly of the opinion that the defendant company is entitled to a credit of endowment insurance rates with interest in making up its analysis of its installments, that

if, for any reason, instead of allowing the company the credit of endowment insurance rates with which to cumulate and increase a reserve or sinking fund to make good the amount advanced, it should be held that all the money paid on account of installments in excess of legal interest (abd) life insurance should be credited directly to the borrower on account of repayment of moneys advanced, I am still of the opinion that the facts previously
86 stated (*to*) me, viz., the superior quality of the insurance furnished, being paid in advance, and the risk which the company takes of receiving its money back from the borrower, and also the additional risk which it assumes of receiving its money from reinsurance of risks would reasonably justify a term insurance rate of more than is accounted for by the excess of installments over and above the legal rate of interest and the amount credited on account of principal. So that, taking this view of it, there could not be possibly any usurious feature in the contract.

(Motion by plaintiff to strike out answer as incompetent, also as irrelevant and immaterial.)

Q. Has the State of Pennsylvania any insurance department as such?

A. It has.

Q. Who is its commissioner?

A. James H. Lambert.

Q. Has the United Security Life Insurance & Trust Company ever been treated by that department as a life insurance company as such?

(Objected to as irrelevant and immaterial.)

A. It has not.

Q. Or has it ever been obliged to make and return as such under its plan of loaning money?

(Same objections.)

A. It has not. It has been specially exempted, after thorough examination, by the department, on the ground that it is not, and that the money having been paid by the company in advance, the law did not contemplate the necessity for any further protection by it of the insured, and that it is not, therefore, life insurance as such, but a great deal better.

FRANCIS H. HEMPERLY.

Subscribed and sworn to before me September 18, 1895.

[NOTARIAL SEAL.] CHARLES E. LEX,
*Notary Public.*

*Certificate.*

STATE OF PENNSYLVANIA, } ss:
*County of Philadelphia,* }

Be it known that I took the annexed deposition of Francis H. Hemperly, pursuant to the annexed notice (or order); that I was

then and there a notary public in and for said county and
87 State; that I exercised the power of that office in taking such deposition; that by virtue thereof, I was then and there authorized to administer an oath; that said witness, before testifying was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice (or order); that the testimony of said witness was correctly read over to him by me before he signed the same; that no examination was conducted on behalf of the plaintiff; that the examination was conducted on behalf of the defendant by William Henry Lex, Esq., and that said depositions were adjourned from Monday September 16th until Tuesday September 17th and from thence until Wednesday September 18, 1895, at which time they were concluded.

Witness my hand and seal this eighteenth day of September, 1895.

[NOTARIAL SEAL.] CHARLES E. LEX,
*Notary Public.*

| | |
|---|---|
| Witness fees | $1 50 |
| Notarial " | 10 50 |
| | $12 00 |

Paid by defendant.

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

It is hereby stipulated by and between the parties plaintiff and defendant in the above-entitled action that the deposition- and testimony of A. E. Stilwell, Robert B. Cone and others, residing at Kansas City in the State of Missouri witnesses on behalf of said defendant shall be taken by and before any notary public residing at Kansas City, Missouri, whose official character as such notary public shall be sufficiently proven by his official seal and an impression thereof affixed to or stamped upon his return hereto; and such notary public is hereby agreed upon and appointed to take the deposition- of said witnesses, at 9 o'clock a. m., on Monday, September 16th, 1895, at the office of Messrs. Trimble and Braley, N. W. corner Seventh and Wyandotte Sts., Kansas City, Missouri; and said parties hereby waive any and all objections to said notary public, and waive the issuing of any commission from said court herein, and hereby agree that said deposition- of said witnesses shall have the
88 same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or the rule of court for the taking of depositions; but said parties reserve to themselves the right to object to the competency and admissibility of said testimony, interrogatories and cross-interrogatories, and to any of the same, and to any of the answers thereto respectively, in like manner and upon

the same grounds as if said witnesses were present and orally examined in open court upon the trial of this cause which is at issue and in said court depending.

And it is further stipulated that said depositions may be adjourned from day to day until the same are fully completed. And it is agreed that the deposition of the Prudential Life Insurance Company taken July 29th, 1895, at Newark, N. J., at the instance of the plaintiff shall also be decreed to have been taken under the above-mentioned terms, the taking of same before filing of replication being waived.

Dated Sept. 5th, 1895.

J. B. RICHARDS,
*Attorney for Plaintiff.*
WM. C. WHITE,
*Attorney for Defendant.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendants.

Depositions of Arthur E. Stilwell and Robert B. Cone, taken before me, Richard H. Stewart, a notary public within and for the county of Jackson and State of Missouri, beginning on the 16th day of September, 1895, at 9 o'clock a. m., pursuant to the annexed stipulation and notice.

At ten o'clock a. m. September 16th, 1895, the defendant in the above-entitled action appears by its attorney J. McD. Trimble and the complainant failing to appear either in person or by attorney, the examination of witnesses is proceeded with pursuant to the annexed notice and stipulation.

ARTHUR E. STILWELL, being by me first duly affirmed to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. What is your given name Mr. Stilwell?
A. Arthur E. Stilwell.
89 Q. Where do you live?
A. Kansas City.
Q. What connection if any, have you with the defendant, The Missouri, Kansas & Texas Trust Company?
A. I am president of the company.
Q. How long have you been president of this company?
A. About five years; before that I was vice-president.
Q. Have you been connected with it continuously since its organization?
A. I have.
Q. You are familiar with the loan which was made to the plain-

tiffs in this case, and the notes and mortgage which were taken back from them to secure the payment of the loan, are you?

A. Yes.

Q. Were you ever engaged in the life-insurance business?

A. Yes, between eight and ten years.

Q. In what capacity were you connected with the life-insurance business?

A. I was special agent for the Travelers' Insurance Company in Illinois, and I was state agent in Connecticut and Rhode Island, and afterwards was appointed by the home office to go throughout the United States and help reorganize their life department. This position I occupied when I became connected with the Missouri, Kansas & Texas Trust Company.

Q. Are you familiar with the life-insurance business, and with the character of business done by the principal life insurance companies in the United States, and with the premiums which they charge for their risks?

A. Very familiar, having made a thorough study of it while I was in the business. I invented four insurance contracts which have been adopted by the Penn Mutual one, and three of the plans were adopted by the Travelers' Insurance Company. I received about six thousand dollars in royalties on these plans, which are the only royalties that I have ever heard of being paid in the United States on any insurance contract.

Q. Are you familiar with life insurance on what is known as the endowment plan?

A. Very familiar.

Q. What is an endowment policy.

A. It is a contract of life insurance, whereby the insurance company in consideration of an agreed premium, insures the life of a person for a fixed term of years, and promises to pay to the
90 beneficiary named in the policy a specified sum of money in case the insured dies within the period named, and to pay the money to the insured himself in case he survives the fixed term.

Q. Do you know what premiums are charged by the principal life insurance companies of the United States for insurance on the endowment plan for a period of ten years on a person thirty years of age?

A. I do.

Q. What are they?

A. They vary somewhat in different companies; the premiums for a ten-year endowment policy on the life of a person thirty years of age range from ninety-two dollars for each thousand dollars of insurance to one hundred and five dollars for each thousand dollars of insurance.

Q. Who invented or devised the plan on which the loan in this case was made?

A. I invented the plan on which this loan was made. Mr. Bentz of Philadelphia invented a similar plan on which the United Security of Philadelphia made similar loans; this is one of the largest trust companies in that State, doing the same character of business; their

rates were about the same as ours, the only difference being that we figured ten per cent. interest on the loan and they figured six per cent.; their rates otherwise are substantially the same as ours.

(Objected to by plaintiffs as immaterial.)

Q. As bearing upon the question as to whether or not you had any purpose in inventing this plan to charge usurious interest or to evade the usuary laws of any State, I will ask you about how it happened you hit upon this plan, or, in other words, what suggested it to you and why was it adopted by you?

(Objection by plaintiff, as calling for incompetent evidence, also as immaterial. Intent is best shown by the contract itself and intent by witness is not that of def't.)

A. The idea of charging an unlawful rate of interest, or of evading the usury laws of any State never once occurred to me. The plan was not adopted for any such purpose, nor on account of any such reasons. The idea was suggested to me in this way: Whilst I was engaged in the insurance business, I noticed that the insurance companies would insure the life of a person for ten years on the endowment plan for one thousand dollars, and that the insurance company would then loan out to some one else the sum of one thousand dollars for the term of ten years, so as to have a fund
91 ready to pay the endowment policy at the end of this term.

And I noticed also that a man would borrow, say, one thousand dollars for the term of ten years, at say, ten per cent. interest, and mortgage his homestead to pay it, and that the same man would then insure his life in some insurance company on the ten-year endowment plan for one thousand dollars for the purpose of having money enough in case he died during the term to pay off his mortgage, or to have a fund accumulated in the hands of the insurance company to pay off the mortgage when it became due in case he survived the ten-year term.

I saw that this man was paying to the loan company one hundred dollars a year for interest, and to the insurance company one hundred dollars a year for premiums, being an aggregate amount of one thousand dollars which he would pay to the loan company as interest, and one thousand dollars which he would pay to the insurance company as premiums during the ten years.

Now at the end of the ten years, if he lived that long, and if the insurance company was solvent, he would get back from the insurance company one thousand dollars, and he would take that one thousand dollars and pay off the principal of his debt. Seeing these things suggested to me the idea of combining the loan and the insurance into one contract, by providing that the borrower should pay to us what he had previously paid to both the loan company and the insurance company, and that we should agree with him to cancel the mortgage in case he died during the term, and if he lived to the end of the term and kept his contract to acknowledge a satisfaction of it. In this way the borrower would get just exactly the same advantages which he would previously have gotten

by his two contracts with the loan company and the insurance company; that is to say, there would be a loan to him of one thousand dollars for ten years at ten per cent. interest, and during the ten years he would pay out no more to us than under the old way he would pay out to both loan company and insurance company.

The borrower, however, under our plan has advantages over the old, viz: that he runs no risk of losing the premiums that he may have paid, as well as being unable to collect the amount of the policy in case he died during the term; whilst on our plan he gets his money in advance and out of that money it is for him to pay back the installments which go to the satisfaction of his interest, and compensation for the risk on his life, and the discharge of his principal debt. It is wholly immaterial to the borrower whether our company was ever solvent, or whether it will remain so.

After having thought out this plan, and after having be-
92 come connected with the Missouri, Kansas & Texas Trust Company, I put it in operation, with the expectation that it would be used more largely by persons who were able to buy a small piece of land, and desired to improve it for a home, and who wanted to borrow money for the purpose of the improvement. In such case we would loan them the money upon this plan, and thus enable them to repay it in small monthly payments which they could pay more readily than in larger installments at greater intervals, and at the same time assure the head of the family that in case he died during the existence of the mortgage that it would be cancelled and his homestead left free for his wife and children.

Q. I will ask you whether or not the plaintiff in this case would have to pay out as much to keep his contract with the defendant as he would have had to pay out if he had borrowed the thousand dollars for ten years at ten per cent interest and had insured his life on the endowment plan for ten years with an insurance company?

(Objection, immaterial and irrelevant.)

A. No, sir. Our terms on a contract like this would be fifteen dollars a month or one hundred and eighty dollars a year and for ten years eighteen hundred dollars. If the plaintiff had borrowed the money at ten per cent., and had taken out with the Travelers' Insurance Company which is the cheapest company known to me for taking a ten-year endowment policy in the United States, he would have had to pay one hundred dollars a year interest to the loan company, and have paid the Travelers' Insurance Company between ninety-two and ninety-three dollars a year at the age of thirty years making at least one hundred and ninety-two dollars a year or nineteen hundred and twenty dollars during the ten years as against eighteen hundred dollars which he would have paid on our plan.

Q. State whether or not in the conduct of the life-insurance business it is the rule to charge more for the risk where the premiums are payable monthly or quarterly, than when payable annually?

A. Yes, sir. I will give you an example. Where the Prudential

Insurance Company, or most any other straight life company would charge twenty dollars a year for straight life contract for one thousand dollars, payable annually, the Prudential charges for the same thing if paid in weekly installments thirty-one dollars a year or a difference of eleven dollars annually to cover the expenses of these smaller collections.

Q. I will ask you why this is.

A. Because it requires twelve times as much stationery and
93 postage, and twelve times as much clerical work to collect and take care of the monthly premiums as it does to collect and take care of the annual premiums, and four times as much for quarterly premiums as for annual ones.

Q. The contract which you made on behalf of the defendant in this case, with the Prudential Insurance Company of America was for insurance on what is called the renewable reducing plan. I will ask you whether life insurance companies would insure a given individual on that plan.

(Objected to as immaterial.)

A. Not to my knowledge. This plan was my own devising, and only covers a large number of risks. It would be impracticable on one life.

Q. Do you know of any insurance company which would insure any given individual on that plan?

(Objection. Immaterial.)

A. I do not.

Q. Do you know any place where the plaintiff could have gotten insurance on this plan?

(Objection. Immaterial.)

A I do not believe that he could have gotten it.

Q. Who acted for the Missouri, Kansas & Texas Trust Company in making the contract with the Prudential Insurance Company for insuring the lives of persons to whom the trust company might loan money on this plan?

(Objection. Immaterial.)

A. I negotiated the contract with the Prudential Insurance Company of America for the insurance on the lives of persons to whom the trust company might loan money on this plan. The rate agreed upon between the trust company and the Prudential Insurance Company was an exceedingly low one; in fact I was surprised when they agreed to charge so low a rate. The ordinary branch of the Prudential Insurance Company had not been in business long then, and made a very favorable contract with us. They took the insurance at a much lower rate than they would do if it were to be done over again. But it should be remembered that in fixing this low rate they took into consideration that they would not be at any expense in soliciting business or collecting premiums, or take any risk upon the premiums not being paid. It was also expected at

that time that the trust company would do a very large business on this plan, and would have a great many lives to insure with the Prudential Insurance Company under the contract.

94 Q. In providing for the monthly installments which should be paid to the defendant under loans which were made on this plan, what difference, if any, did you make on account of the different ages of different persons?

(*Q.*) Very little difference; only fractional; and we avoided taking any lives over forty years; we made no difference for any under thirty-five but required the same monthly payment to be paid by all persons under thirty-five years of age.

Q. I will ask you whether the defendant is still loaning money on this plan or whether it has ceased to do that business.

A. We have ceased to loan money on this plan.

Q. Why?

(Objection. Entirely immaterial.)

A. The expense of attending to the collections in the different cities the commissions paid agents in soliciting the business, and the fact that the expenses incident to the examination of the abstracts and the examination and the appraisement of the property on these small loans was about as great as if they had been larger, and we found no money in the business and abandoned it.

Q. How long since you have made any loans on this plan?

A. About two years. ARTHUR E. STILWELL.

Being unable to complete the taking of the depositions on behalf of the defendant on this day, the same were by me adjourned until tomorrow morning, September 17th, 1895, at nine o'clock a. m.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

Being unable to complete the taking of these depositions on this, the 17th day of September, 1895, the same are by me adjourned to tomorrow morning, September 18th, 1895.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

Being unable to complete the taking of these depositions on this the 18th day of September, 1895, the same are by me adjourned to tomorrow morning, September 19th, 1895.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

95 Being unable to complete the taking of these depositions on this the 19th day of September, 1895, the same are by me adjourned to tomorrow morning, September 20th, 1895.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

Being unable to complete the taking of these depositions on this the 20th day of September, 1895, the same are by me adjourned until tomorrow morning, September 21st 1895, at nine o'clock a. m.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

Being unable to complete the taking of these depositions on this the 21st day of September, 1895, the taking of the same is by me adjourned until Monday, the 23rd day of September 1895, at nine o'clock a. m.

My commission expires Sept. 6th, 1897.

[NOTARIAL SEAL.] RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

At nine o'clock, September 23rd 1895, the defendant in the above-entitled action appeared by its attorney J. McD. Trimble, and the plaintiffs herein appeared not, either in person or by attorney, and the taking of these depositions was resumed.

ROB'T B. CONE, a witness for defendant, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. Where do you live Mr. Cone?

A. In Kansas City, Missouri.

Q. How long have you lived here?

A. A little over eight years.

Q. What connection, if any, have you with the defendant The Missouri, Kansas & Texas Trust Company?

A. I have been associated with them for something like six years in various positions, until, at the present time, since about 1892, I have occupied the position of secretary.

Q. Are you familiar with the contract involved in this case, that is the notes and mortgage given by Theodore M. Krumseig and wife to the Missouri, Kansas & Texas Trust Company?

96 A. Yes, sir, I know all about it, and am familiar with all of its terms and conditions, and have been for several years.

Q. What, if anything, do you know about the life-insurance business?

A. I think I know a good deal about it. I was born and raised in Hartford, Connecticut, where everybody knows something of insurance. I worked for two years for the Travelers' Insurance Company. During the last year I have devoted a good deal of time to the study of the life-insurance business, and the various plans adopted by the different companies of the United States, and the rates charged, and have familiarized myself with the theory and practical operation of the business.

Q. What similarity, if any, does the contract in question in this case bear to a ten-year loan and a ten-year endowment policy?

(Objection by plaintiff. Incompetent. Contract speaks for itself.)

A. The contract involved in this case is similar to a ten-year loan

and a ten-year endowment policy. The borrower in this case has all of the benefits and advantages of both a ten-year loan and a ten-year endowment policy on his life, and other additional benefits and advantages. In fact the only difference between this contract and a straight loan and endowment policy, consist- in the additional and superior advantages which the borrower has, under this contract over and above those he would have in case he borrowed money for ten years and then insured his life for ten years on the endowment plan.

Q. What are these superior advantages which (c)institute) as you say the only difference between this contract and a straight ten-year loan and a ten-year endowment policy?

(Objection, irrelevant and immaterial.)

A. In the first place, under this contract, the plaintiff agrees to pay out as interest and as compensation for the agreement to cancel his debt in case of death, three hundred and sixty dollars per year, whilst if he had borrowed the same amount of money for ten years at ten per cent. and had insured his life for ten years for the same amount on the endowment plan, he would have been obliged to pay out at least three hundred and eighty-four dollars and ninety cents, if he paid annually. If he paid monthly it would be considerably more. Hence, one advantage which the plaintiff has in this contract over what he would have under the other arrangement is that this contract is cheaper to him by twenty-four dollars
97 and ninety cents per year, and cheaper in the aggregate by two hundred and forty-nine dollars than if he secured the same results by means of a ten-year straight loan, and a ten-year non-participating endowment policy. In short, this contract costs him thirty-six hundred dollars, whilst the other plan would cost him thirty-eight hundred and forty-nine dollars.

In making this comparison of cost, I have taken the rate charged by the Travelers' Insurance Company for a ten-year non-participating endowment policy, on the life of a person twenty-eight years of age. This is the rate when the premiums are payable annually, if it were payable in monthly installments the rate would be very much higher and the disparity between the cost of the two plans materially greater.

In the next place the advantage of the plaintiff on this plan, over the other, is that he takes no risk in getting the full fruits of his contract in case of his death, for by the mere fact of his death the unpaid portion of his debt is satisfied, in case he dies during the term, the contract by reason of his death, becomes fully performed and closed. Whilst, in case he insured his life in the ordinary way, his contract of insurance would not be performed and closed; his heirs would merely become entitled to performance, and would incur all of the expenses and risks incident to enforcing performance, that is, collecting the insurance. So you see that the plaintiff in this case gets certain results absolutely fixed at a cost of thirty-six hundred dollars, whilst under the other plan, he gets merely a promise of

the same results at a cost of thirty-eight hundred and forty-nine dollars.

(Motion to strike out answer on said grounds.)

Q. I notice, Mr. Cone, that in making your calculations as to the comparative cost of the two plans under consideration, you continue the annual premiums for the endowment policy at $92.45 throughout the entire term of ten years. Now it has been suggested to me that the plaintiffs' counsel claims that inasmuch as the defendant's loan is constantly decreasing and consequently that the amount that the defendant would lose in case of death is constantly growing less, the charge for the agreement to cancel the debt in case of death should be correspondingly decreased from year to year, or from month to month. Why is this not true?

A. It is a fact that the amount the defendant would lose in case of the plaintiff's death is growing less from time to time, but it is not true that the amount charged for the risk should be also
98 decreased. To illustrate: take any life-insurance contract, for instance one on the ten-year endowment plan that we have been talking about, and you will see that the amount that the insurance company will lose in case of death is constantly decreasing, but the annual premiums remain the same throughout the term. If I should obtain from an insurance company a ten-year endowment policy on my life for one thousand dollars, the premium would be the same each year during the term. Say the premium was one hundred dollars per year; now if I died during the first year the insurance company would lose nine hundred dollars on this contract; if I died after having paid five premiums the company would lose five hundred dollars; if I died during the last year, after having paid nine premiums the loss to the insurance company would be only one hundred dollars, so that you see whilst the possible loss to the insurance company is decreasing from year to year the premium remains the same. Now if the premiums were placed on a sliding scale so as to decrease in direct ratio to the (decreace) of the possible loss; then it would be necessary to charge a much larger premium at the beginning than is done now, in order to compensate for the risk.

(Motion to strike out answer after words "to illustrate" on grounds of immateriality and irrelevancy. (Comparison is made with endowment policies while this contract is simply ordinary life indemnity, with no endowment feature.)

Q. Mr. Cone, you are familiar with the life-insurance business, and know all about the terms of the contract involved in this case. Now if the contract involved in this case is not life insurance, why is it not?

(Objected to as clearly calling for incompetent evidence.)

A. I don't know what definition a lawyer would give to life insurance but in the ordinary acceptation of the words they mean a contract, whereby the insurer promises to pay out a certain sum of

money upon the death of a person, and Webster so defines it. Under this contract the defendant does not promise to pay out anything upon the death of a person. It delivered to the plaintiff at the beginning all of the money it agreed to deliver to him in any event. It merely promises not to ask a repayment of it in case he dies before he has paid it. It is true that a contract of life insurance and this contract both include a chance of death, but the one is a promise to pay something in the event of that death and the other is a promise to do nothing in case of death, but merely an agreement that his death will satisfy the debt. In the case of life insur-
99 ance the insurance company has in its hands all of the money, and the insured takes all of the risk of losing the premiums paid, and the risk of being unable to collect the amount of his policy in case of death, but under this contract, the plaintiff takes no risk whatever; he has the money from the start and the defendant takes all of the risk of being able to get it back again; the defendant fully performs the contract on its part in the beginning, and the contract is fully carried out (*bu*) it at the outset; there is nothing more for it to do, a complete performance of the terms of the contract depends solely upon the acts of the plaintiff, he gets the money in advance and makes all of the promises of future performance, and he does not have to rely upon any promise of the defendant for future performance.

It is immaterial to him whether the defendant is solvent or insolvent, and he has no concern in the question as to whether the defendant is ever willing or able to keep its contracts, as it will in no event owe him anything, but the reverse is true of life insurance.

Q. What are the rates charged by the principal life insurance companies of the United States for insurance on the ten-year endowment plan, at the age of twenty-eight years?

A. I have before me a set of figures taken from a general book on insurance rates of all life insurance companies in the United States and I have selected from these the rates of four of the prominent companies, with which I am most familiar, and I will quote you their rates as follows:

The Provident Life & Trust Co. of Philadelphia charges at the age of twenty-eight years $100.10 a year for one thousand dollars on the ten-year endowment plan. The New York Life Insurance Company charges $106.30. The Aetna Insurance Company of Hartford Conn., charges $95.89. The Travelers' Insurance Company of Hartford Conn., charges $92.45.

You will notice something of a discrepancy in the rates charged by these various companies, and I will give an explanation of the discrepancy, that in the two companies which have the two highest rates, policy-holders have some interest placed to their credit derived from certain profits of the company. The Travelers' Insurance Company which is also one of the four, is a non-participating rate, or as it is often spoken of a "stock company rate," in other words, the policy-holder will have to pay each year for a term of years an exact amount, and he receives at the end of that term simpl- the face of

his policy to the extent of the amount originally contracted for, and no profits from any source which the company may have.

Q. Did the defendant take out life insurance on the life of the plaintiff in this case?

A. Yes, sir.

100 Q. On what plan was that insurance obtained?

A. Upon the renewable reducing plan.

Q. In what insurance company did the defendant take out this insurance?

A. In the Prudential Insurance Company of America, at Newark, New Jersey.

Q. Was the insurance which the defendant obtained on the life of the plaintiff a single transaction or contract, or was it one that was covered by a blanket contract?

A. It was one that was covered by a blanket contract.

Q. Could the plaintiff or any other individual obtain for himself any insurance on this renewable reducing plan?

(Objected to as immaterial.)

A. At the rates that were given us, no. And to the best of my knowledge, I am certain that no insurance company does that kind of business in individual cases

Q. How long since the defendant has made any loans on this plan?

A. About two years.

Q. Why did it stop making loans on this plan?

(Objection. Immaterial.)

A. There was no profit in the transaction. Most of the loans made on this plan were small ones, and generally were made to persons of moderate means. The making of a small loan is attended with about as much expense as a large one; that is to say, the examination of the abstract of title, and examination and appraisement of the property, the handling of the loan and the collecting of the installments is just as great in a small loan as a larger one, and on account of the fact that most of these loans were made to persons of moderate means, delays and annoyances frequently occur in the collection of the installments, and the further fact that the installments were made payable monthly made largely increased expenses incident to the handling of the business and the collection of the installments. After an experience of about four years in making loans on this plan it was abandoned as being unprofitable.

ROB'T B. CONE.

STATE OF MISSOURI, }
*County of Jackson,* } *ss:*

Be it known that I took the annexed depositions pursuant to the annexed notice; that I was then and there a notary public in and for the county of Jackson in the State of Missouri; that I exercised the powers of that office in taking such depositions; that by

101 virtue thereof I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn

to testify the whole truth, and nothing but the truth, relative to the cause specified in the annexed notice; that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the defendant by J. McD. Trimble, and that the plaintiff did not appear; that the same were taken stenographically in the presence of the witness and thereafter reduced to writing upon a typewriter, and were then read to the witness and by him subscribed in my presence.

Witness my hand and seal this 23rd day of September, 1895.

RICHARD H. STEWART,
*Notary Public in and for Jackson County, Mo.*

[NOTARIAL SEAL.]

My commission expires September 6, 1897.

*Cost Bill.*

Notary's fees—

| | |
|---|---|
| Swearing witnesses | |
| Certificate and seal | $4 50 |
| Foliage, 30 folios at $0.15 | 4 50 |
| Witnesses, Pres. Arthur E. Stilwell, 1 day | 1 00 |
| Rob't B. Cone, 1 day | 1 00 |

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

It is hereby stipulated by and between the parties plaintiff and defendant in the above-entitled action, that the deposition and testimony of William S. Taylor, witness on behalf of said defendant, shall be taken at the office of Missouri, Kansas & Texas Trust Co., 400 Chestnut St., Philadelphia, by and before any notary public residing at Philadelphia, Penn., at 9 o'clock a. m. Oct. 1st, 1895; whose official character as such notary public shall be sufficiently proven by his official seal and an impression thereof affixed to or stamped upon his return hereto; and such notary public is hereby agreed upon and appointed to take the deposition of said witness; and said parties hereby waive any and all objections to such notary public, and waive the issuing of any commission from said court herein, and hereby agree that said deposition of said witness shall have the same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or rules of court for the taking of depositions; but said parties reserve the right to themselves to object to the competency and admissability of said testimony and to any of the same, and to any of the answers thereto respectively, in like manner and upon the same grounds as if said witness was present and orally examined in open court upon the trial of this cause which is at issue and in said court depending; and the taking of said deposition may be adjourned from day to

102

day until the same is completed; and it is provided, however, that the taking of same shall not delay the final hearing of said matter above entitled.

Dated Sept. 25, 1895.

J. B. RICHARDS,
*Attorney for Plaintiffs.*
WM. C. WHITE,
*Attorney for Defendant.*

U. S. C. C., Fifth Division, Dis. of Minn.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs,
*vs.*
THE MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

TUESDAY, *October* 1, 1895.

Present: W. H. Lex, Esq., for defendant.

Deposition of William Shipley Taylor, residing at Philadelphia, in the State of Pennsylvania, a witness called on behalf of the said defendant, taken before Charles E. Lex, notary public, in accordance with the stipulation duly filed in said cause.

WILLIAM SHIPLEY TAYLOR, having been duly affirmed according to law, deposes and says:

By Mr. LEX:

Q. Please give (you) age, residence, and occupation.

A. My age is forty-eight; I live at 6020 Overbrook avenue, Philadelphia; I am third vice-president and treasurer of the Missouri, Kansas & Texas Trust Company.

Q. Are you familiar with the contract made between your company and Theodore M. Krumseig and Louise Krumseig?

A. The form of the contract which our company has with Theodore M. Krumseig and Louise is similar to all our other forms. All the contracts are alike.

103 Q. What is the nature of your contract in this and other cases to which you have referred?

(Objection as incompetent.)

A. I have always described our contract, and my understanding of it, as the reverse of an endowment policy. The man in an endowment policy received his money at the end of ten years, and with us we give the man the money and we get it back during the ten years.

Q. So that in your case the borrower gets the money at the time he makes his application, provided that application is favorably considered by the company?

A. Yes, sir.

Q. He gets his money in advance?

A. Yes, sir; and pays it back in monthly installments.

Q. Is it or is it not therefore a loan contract?

A. Yes, sir; it is a loan contract. It is a regular guarantee with a clause of cancellation in case of the man's death. That is a clause of perpetual forbearance added.

Q. Did you in reference to your loan contracts such as you have just described, have any conversation with the insurance department of the State of Minnesota? If so, in your own way please give me the details of such conversation.

(Objected to as irrelevant and immaterial.)

A. Yes, sir; before doing any business in Minnesota, that we might be sure of our standing with the State, I went from Duluth to St. Paul and had an interview with the insurance commissioner of the State of Minnesota, I do not remember what his name was at that time, and explained the features of our company, our methods of doing business with mortgages throughout. He had his chief clerk with him, and we had a long conversation, I think I spent the great part of a day with him, and he told me before leaving that he was thoroughly satisfied that it was all right, that we did not come under the insurance commissioner in any way, and that nothing was required in the way of making entry of our company in that State. So we thought it was perfectly safe to do business there.

(Motion to strike out answer as irrelevant and immaterial.)

Q. Did you speak with him in reference to the necessity of the the defendant company complying with the insurance laws, and if so, what was the result of that?

(Objected to as irrelevant and immaterial.)

A. He decided that we did not come under the insurance commissioner at all, that we were not an insurance company,
104 and that we were not doing an insurance business, because, as I explained to him, his duties as commissioner were to look after insurance companies to see that they had reserve on hand in case the man died or at the maturity of the policy to be able to pay that debt, but with us, as we gave the man the money in advance, that there was no risk assumed by him as to the solvency of the company, and that was what he the commissioner was interested in.

Q. Was anything said in the interview as to the necessity of filing the charter of your company in any of the State departments?

(Objected to as irrelevant and immaterial.)

A. He told me it was not. It was mentioned, I asked him the question, and he told me it was not necessary for us to file the charter or do anything, that we were not responsible to any of them, and that we could make loans in the State without.

Q. What, if anything, was said by him in relation to your company being obliged to make a deposit with any of the departments of the State of Minnesota?

(Same objection as above.)

A. He said it was not required. I was very careful about that whole matter, to go to the insurance commissioner and explain very thoroughly, so that this question should be avoided in any way, and at first he did not understand our company, but he took a great deal of interest in the explanation and he thought it was an excellent plan. When we got through he quite complimented us on the scheme, which was new to him.

Q. When did this interview take place?

A. I cannot tell you when that was. I have not any data.

Q. How long after your company had organized about?

A. It must have been three years after, I should think. I am not positive whether it was in the winter of 1890 or 1891. I think it was in one of those years.

(Motion to strike out all foregoing testimony as to what State officers said, as immaterial. It appears also that it might not have occurred until after the contracts were made.)

Q. Reverting to the last contract that was made in this case with Theodore M. Krumseig and his wife, Louise, please explain what similarity, if any, it bears to a straight loan, or to what is
105 popularly known as an endowment policy? Describe in your own way the similarity or the difference between them.

(Objected to as incompetent.)

A. It is similar (*in*) a straight loan in that the borrower gets his money in advance. It is different from a straight loan in that the borrower gradually pays the loan off by installments, and that at the end of the period, if he has kept his installments paid up, the mortgage which he has given as security therefor is satisfied, with this very wise and safe additional feature, that if while the contract is running he should die, no matter whether he has paid one or many installments, the mortgage is immediately thereupon satisfied.

Q. Compare it with an endowment policy.

(Objected to as irrelevant and immaterial.)

A. With any of the standard companies it is cheaper than it would be possible for a man to borrow the money and to secure its repayment through life insurance in an endowment policy. The rate is much cheaper than any of the standard companies.

Q. So that taking into consideration the interest on a straight loan plus premium for life insurance, I understand you that an endowment policy would cost him more than the installments which he pays under your loan contract?

(Objection, same as above.)

A. That is right; yes, sir.

Q. What is the difference between your loan contract and an endowment policy as to the time when the borrower gets his money?

(Objection, same as foregoing.)

A. On the endowment policy he gets the money at the end of the term. With ours he gets it at the beginning.

Q. In getting his money as he does at the beginning, what risk does he take of the solvency of the company, or anything of that kind?

A. He does not take any. That was the point with the insurance commissioner.

Q. I understand you that that was one of the features that excited his approval?

A. Yes, sir.

W. S. TAYLOR.

Subscribed and affirmed to before me October 1, 1895.

[NOTARIAL SEAL.] CHARLES E. LEX,
*Notary Public.*

106 COMMONWEALTH OF PENNSYLVANIA, }
*County of Philadelphia,* } ss:

I, Charles E. Lex, notary public within and for the State and county aforesaid do certify that by virtue of the within and foregoing stipulation the testimony of William S. Taylor was taken before me at the office of Missouri Kansas and Texas Trust Company, 400 Chestnut street in the city of Philadelphia on the first day of October 1895 at 9 o'clock a. m. and was reduced to writing by C. H. Guilbart a disinterested person in my presence and under my direction. That said testimony was taken by and pursuant to the authority and requirements of the said stipulation. That William S. Taylor said witness before examination was affirmed to testify the whole truth and nothing but the truth relative to the cause specified in said stipulation and that the testimony of said witness was carefully read by William S. Taylor said witness and then by him subscribed in my presence. Additions and alterations made by witness.

[NOTARIAL SEAL]. CHARLES E. LEX,
*Notary Public.*

| | |
|---|---|
| Witness fees..... | $1 50 |
| Notary " ..... | 3 50 |
| | $5 00 Paid by defendant. |

That on the 11th day of January, A. D. 1896 a decision of the court ordering a decree for complainant was filed with the clerk of said court, which said decision and order is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG *et ux.*, Complainants,
*vs.*
MISSOURI, KANSAS & TEXAS TRUST COMPANY and Union Trust Company of Philadelphia, Pa., Defendants. } In Equity.

J. B. Richards, solicitor for complainants.
William C. White, solicitor for defendants.

*Suit to Cancel a Mortgage on the Ground of Usury.*

NELSON, *J.:*

The bill alleges that on or about July 29, 1890, complainant Theodore M. Krumseig made a written application to defendant, a corporation of the State of Missouri, for a loan of $2,000 to be
107 secured upon certain property owned by them in the city of Duluth, Minnesota, and among the conditions in said application was the following:

"In consideration of the above premises I agree to execute and deliver to the said company 10 promissory notes, each of the sum of $360 payable in monthly installments of $30, commencing at date of signing contract. The said notes cover principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements. The contract hereafter to be entered into, if my application shall be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing, in case of my death before payment of any unpaid installments, a release of unpaid portion of debt, if I shall have promptly paid previous installments and kept other conditions. As part of foregoing condition I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual fee of $3 therefor; and to pay all fees for recording deed of trust or mortgage."

That thereupon Theodore M. Krumseig, passed the medical examination required, paid the fee demanded, and complainants then executed ten certain promissory notes, each for the sum of $360, dated September 5, 1890, payable in monthly installments of $30, with interest at 10 per cent. after due, forty-one of which installments amounting to $1,230 have been paid; on the same day, in order to secure these notes, they executed and delivered to defendant Missouri, Kansas & Texas Trust Co., a mortgage on the premises, with the usual covenants of warranty and defeasance, reciting the indebtedness of $3,600 in manner and form aforesaid, and containing in addition thereto the following clause:

"And it is further understood and agreed by and between the said parties of the first part, their executors, administrators or assigns

and the said party of the second part, The Missouri, Kansas & Texas Trust Company, that in case said Theodore M. Krumseig, one of the parties of the first part, should die after the execution and delivery of the said notes and this mortgage, and within ten years (thereafter), each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the
108 first part, and this mortgage shall be cancelled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly installment that shall have become due prior to his death, according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not without written consent of the party of the second part visited the torrid zone, or personally engaged in the business of blasting, mining, or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train, or on a steam or sailing vessel for two years."

The bill alleges further that the sole consideration for the notes and mortgage was: 1st. The sum of $1,970 together with the interest thereon from date until maturity of the installment notes; and, 2nd. The clause in the mortgage last referred to, which latter was in fact an arrangement between defendant and the Prudential Life Insurance Company of Newark, N. J., to save the former harmless from any loss that might occur to it in case of the death of complainant, Theodore M. Krumseig, during the term covered by the mortgage.

There is also an allegation that defendant has not complied with the laws of the State of Minnesota governing life insurance companies, and that the contract is therefore void. Complainants ask that the mortgage be cancelled of record and the remaining notes be delivered up to them.

The answer denies that the contract is usurious, and alleges that the sum of $1,970 received by complainants, with the legal interest thereon and the cost of the guaranty of defendant to cancel the loan in case of the death of Theodore M. Krumseig during the continuance of the contract, constituted a full and ample consideration for the notes and mortgage in question, and that the same was so understood and agreed to by complainants at the time of the execution of the contract.

A stipulation was subsequently entered into by which the Union Trust Company of Philadelphia, Pa., was made a party defendant.

This contract cannot be upheld; it is contrary to public policy, and tainted with usury. Ingenious, and novel in character, it must have taxed to the utmost the skill of the originator. It has about it certain features of life insurance, a plan denominated by the counsel and some of defendant's witnesses, "the reverse of endowment insurance." It is certainly not an ordinary life-insurance contract, in the general acceptation of the term.

109 One of defendant's witnesses describes it as follows: "It is similar to a straight loan, in that the borrower gets his

money in advance; it is different from a straight loan, in that the borrower gradually pays the loan off by installments, and that at the end of the period, if he has kept his installments paid up, the mortgage which he has given as security therefor is satisfied, with this * * * additional feature, that if while the contract is running he should die, no matter whether he has paid one or many installments, the mortgage is immediately thereupon satisfied."

The undoubted purpose of the defendant was to loan money, and at the same time secure as far as possible indemnity against loss to itself, at the expense of the borrower. The supreme court of Minnesota described a similar contract, in substance, as a loan of money with an agreement for perpetual forbearance in case of death, and holds that the contingency set up, the continuance of the life of the borrower, was a mere contrivance to cover usury. M. K. & T. Trust Co. *v.* McLachlan, 61 N. W. 560.

Complainants could not have obtained the loan without submitting to this feature of the contract, the result of which when carried out, is to give defendant a greater compensation for the use of the money than that allowed by the law of Minnesota.

It is undisputed that defendant had a contract with the Prudential Insurance Company of Newark, N. J., under which it secured indemnity against loss upon transactions similar to the one in question; and that in this instance it obtained a policy of insurance upon the life of Theodore M. Krumseig in favor of itself upon what is called the "Renewable, reducing term plan." Such policies were to be issued for ten successive years, and decreasing in amount payable each year; so that, as the payments were made upon the loan, the amount of insurance upon the life of the borrower was also decreased.

It is not necessary to decide whether this contract could be upheld, in case the lender had charged complainants merely the amount it paid the insurance company for indemnity; for it appears conclusively from the testimony that it bound them to pay a sum far in excess of the cost to it for this indemnity. Such a contract is usurious under the law of Minnesota, and the agreement for perpetual forbearance does not relieve it from the taint.

Complainants seek the cancellation of the mortgage and notes for usury. The supreme court of Minnesota in the case of Scott
110 *v.* Austin, 36 Minn., 460, held that under sec. 2214 Gen. St. 1894, which declares that all usurious notes, conveyances, contracts and securities "shall be void," except as to certain *bona fide* purchasers, it is not necessary for the party thus situated to tender or pay the amount of money received, as a condition of obtaining relief.

Upon the other point made by counsel for complainants, that such a contract is in violation of the laws of Minnesota, with reference to insurance companies, it is not necessary for the court to pass.

Complainants are entitled to a (decree) with costs, and it is so ordered.

In the case of John L. Foote *et ux. v.* these defendants, a decree will be entered in accordance with this decision.

Dated Jan. 10, 1896.

R. R. NELSON, *Judge.*

That on the 28th day of January, A. D. 1896, there was filed with the clerk of said court the final decree in said cause, which said final decree is, in words and figures, as follows, to wit:

*Final Decree.*

United States Circuit Court, District of Minnesota, Fifth Division.

| | |
|---|---|
| THEODORE M. KRUMSEIG & LOUISE KRUMSEIG, Complainants, *vs.* MISSOURI, KANSAS & TEXAS TRUST COMPANY & UNION TRUST COMPANY, Defendants. | In Equity. |

This cause came on to be heard at this term, the regular October term of said court in the year 1895, held at the city of Duluth, Minnesota, present, the Hon. R. R. Nelson, judge, and was argued by counsel, J. B. Richards, Esq., appearing for complainants, and W. C. White, Esq., appearing on behalf of defendant Missouri, Kansas & Texas Trust Company, and defendant Union Trust Company disclaiming all interest in or to the property, notes or mortgage described in the pleadings herein; and thereupon, upon consideration thereof,

It is ordered, adjudged and decreed as follows, viz: That the prayer of the complainants be granted; and that that certain mortgage of date September 5th, 1890, executed by complainants Theodore M. Krumseig and Louise Krumseig, his wife, mortgagors, and delivered to said Missouri, Kansas & Texas Trust Company,
111 defendant, as mortgagee, and recorded in the office of the register of deeds of St. Louis county, Minnesota, on the 5th day of September, 1890, in Book "50" of Mortgages on page 443 and following, cov- on the lot seven (7) of block sixty-two (62), of Portland division of Duluth, Minnesota according to the plat thereof duly recorded in the office of said register of deeds of St. Louis county and State of Minnesota, is void; and that the notes secured by said mortgage are void, to wit, the notes therein described, being the ten (10) promissory notes dated September 5th, 1890, each for the sum of three hundred sixty ($360) dollars, payable in monthly installments of $30 per month commencing with the 5th day of September, 1890, and ending with September 5th, 1900, executed to the defendants by the complainants; and that defendants have no interest in said lot 7, block 62 by virtue of said mortgage; and that the said mortgage is hereby ordered cancelled and discharged of record as fully as if satisfied by defendants in usual form upon full payment thereof; and said notes and each of them are hereby cancelled and ordered to be delivered up to complainants, or their at-

torney, on demand; and that said defendants are hereby forever enjoined from taking any action or proceeding for the enforcement of said notes or mortgage; and that the record in the office of the register of deeds of said St. Louis county, Minnesota, of a copy of this decree duly certified by the clerk of said court shall discharge the said mortgage from said records; and that the defendant, The Missouri, Kansas & Texas Trust Company pay to said complainants the sum of —— dollars ($—) for their costs and disbursements of this action to be taxed and inserted herein.

Dated Jan'y 25th, 1896. *Nunc pro tunc* as of Oct. 22nd, 1895.

By the court:

R. R. NELSON, *Judge.*

That on the 4th day of February, A. D. 1896, there was filed with the clerk of said court, by solicitor for defendant, its appeal from the order and decree herein, duly approved by the Honorable R. R. Nelson, judge of said court, which said appeal is, in words and figures, as follows, to wit:

United States Circuit Court, Fifth Division, District of Minnesota.

| | |
|---|---|
| THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, vs. MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant. | In Equity. No. 177. |

The above-named defendant, conceiving itself aggrieved
112 by the decree made and entered on the 28th day of January, 1896, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

Dated Jan. 30th, 1896.

WM. C. WHITE,
*Attorney for Defendant.*

The foregoing claim of appeal is allowed.

Dated Feb'y 3, 1896.

R. R. NELSON,
*Circuit Judge.*

That on the same day, to wit, the 4th day of February, A. D. 1896, there was filed with the clerk of said court, by attorney for the defendant, its assignment of errors, which are, in words and figures, as follows, to wit:

*Assignment of Errors.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, *vs.* MISSOURI, KANSAS & TEXAS TRUST COMPANY. } In Equity. No. 177.

Comes now the defendant, by William C. White, its attorney, and says that the decree in said cause is erroneous and against the just rights of said defendant. The copy of the record of said decree and the papers and proceedings in said cause, is made a part of this assignment of errors; and the said defendant says that there is manifest error in the ruling, decision and decree of said honorable court, and respectfully hereby makes the following assignment of errors in said cause:

I. The decision and decree herein were erroneous and improper, because there was no equity in said cause entitling the plaintiffs to the relief granted;

II. Because the decision and decree are not sustained by the evidence and are contrary thereto;

III. Because the decision and decree are contrary to law;

113 IV. Because the defendant was entitled to a decision and decree in its favor, for dismissal of plaintiffs' complaint and for costs.

Dated, Jan. 30th, 1896.

WM. C. WHITE,
*Attorney for Defendant.*

That on the same day, to wit: the 4th day of February, A. D. 1896, there was filed with the clerk of said court, by the attorney for defendant herein, its bond on appeal, which said bond is, in words and figures, as follows, to wit:

*Bond on Appeal.*

United States Circuit Court, Fifth Division, District of Minnesota.

THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Plaintiffs, *vs.* MISSOURI, KANSAS & TEXAS TRUST COMPANY, Defendant.

Know all men by these presents, that we, Missouri, Kansas and Texas Trust Company as principal, and A. E. Stilwell and J. McD. Trimble, as sureties, are held and firmly bound unto the plaintiffs, Theodore M. Krumseig and Louise Krumseig, in the full and just sum of five hundred dollars, to be paid to the said Theodore M. Krumseig and Louise Krumseig, their heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and

severally by these presents. (*Dealed*) with our seals and dated this 31st day of January in the year of our Lord, one thousand eight hundred and ninety-six.

Whereas lately at the October, 1895, general term of the said United States circuit court, for the fifth division of the district of Minnesota, in a suit pending in said court between said Theodore M. Krumseig and Louise Krumseig, plaintiffs, and Missouri, Kansas & Texas Trust Company, defendant, a decree was rendered against the said defendant Missouri, Kansas & Texas Trust Company, and the said Missouri, Kansas & Texas Trust Company has obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said Theodore M. Krumseig and Louise Krumseig, citing and admonishing them to be and appear in the United States
114 circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, in said circuit, on the 3rd day of April next.

Now the condition of the above obligation is such, that if the said Missouri, Kansas & Texas Trust Company shall (procecute) said appeal to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

[CORPORATE SEAL.] MISSOURI, KANSAS & TEX. TRUST COMPANY, [SEAL.]
By A. E. STILWELL, *President.*
A. E. STILWELL. [SEAL.]
J. McD. TRIMBLE. [SEAL.]

Sealed and delivered in presence of—
F. B. WILCOX,
JAQUES O. NOLTHENIUS.

Attest: ROB'T B. CONE, *Sec'y.*

Approved by—
R. R. NELSON,
*Circuit Judge.*

STATE OF MISSOURI, } ss:
*County of Jackson,* }

On this 31st day of January, 1896, before me, a notary public within and for said county, personally appeared A. E. Stilwell and J. McD. Trimble to me known to be the persons described in and who executed the foregoing and within instrument as sureties, and acknowle-ged that they executed the same as their free act and deed; also at the same time and place before me appeared A. E. Stilwell, to me personally known, who being by me duly sworn, did say that he is the president of the Missouri, Kansas & Texas Trust Company, of Kansas City, Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said cor-

poration by authority of its board of directors; and said A. E. Stilwell acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] JNO. M. MASON,
*Notary Public, Jackson County, State of Missouri.*

My commission expires August 9, 1897.

115 STATE OF MISSOURI, } ss:
*County of Jackson,* }

On this 31st day of January, 1896 before me appeared A. E. Stilwell and J. McD. Trimble, and each being sworn, says each for himself that he is one of the sureties above named; that he is a resident and freeholder of the State of Missouri, and worth the amount of five hundred dollars specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

A. E. STILWELL.
J. McD. TRIMBLE.

Subscribed and sworn to before me Jan'y 31st, 1896.

[NOTARIAL SEAL.] J. M. MASON,
*Notary Public.*

My commission expires Aug. 9th, 1897.

That on the 4th day of February, A. D. 1896, there was filed with the clerk of said court, the original citation in said cause, which said original citation is, in words and figures, as follows, to wit:

UNITED STATES OF AMERICA:

To Theodore M. Krumseig and Louise Krumseig, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal this day allowed by the United States circuit court for the district of Minnesota, fifth division, wherein The Missouri, Kansas & Texas Trust Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said Missouri, Kansas & Texas Trust Company as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Fifth Division.

Witness the Honorable R. R. Nelson, one of the judges of the circuit court for the district of Minnesota, this 3rd day of February, A. D. 1896.

R. R. NELSON,
*Judge of the U. S. Circuit Court.*

116 United States circuit court, district of Minnesota, fifth division. Theodore F. Krumseig & Louise Krumseig *vs.* Missouri, Kansas & Texas Trust Co., defendant. Citation. Original. Service of the within citation by copy is admitted this 4th day

of February, 1896, said copy being served upon and left with me at my office in Duluth, Minn., on said Feb'y 4th, 1896. J. B. Richards, att'y for Theodore M. Krumseig and Louise Krumseig, appellees.

Filed Feb. 4, 1896. Oscar B. Hillis, clerk. T. H. Pressnell, deputy.

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 154 pages, numbered consecutively from 1 to 154 inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Duluth, in the district of Minnesota, this 15th day of February, A. D. 1896.

OSCAR B. HILLIS, *Clerk*,
By T. H. PRESSNELL, *Deputy*.

Filed Feb. 19, 1896. John D. Jordan, clerk.

117 And on the twenty-second day of February, A. D. 1896, an appearance of counsel for appellant was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSIEG and LOUISE KRUMSIEG. } No. 756.

The clerk will enter my appearance as counsel for the appellant.
WILLIAM C. WHITE.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1896. No. 756. Missouri, Kansas and Texas Trust Co., appellant, *vs.* Theodore M. Krumsieg *et al.* Appearance. Filed Feb. 22, 1896. John D. Jordan, clerk. William C. White, counsel for appellant.

And on the eleventh day of March, A. D. 1896, an appearance of counsel for appellees was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSEIG & LOUIS- KRUMSEIG. } No. 756.

The clerk will enter my appearance as counsel for the appellees.

J. B. RICHARDS.

118 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1896. No. 756. Mo., Kan. & Tex. Trust Co., appellant, *vs.* Theo. M. Krumseig *et al.* Appearance. Filed Mar. 11, 1896. John D. Jordan, clerk. J. B. Richards, Duluth, Minn., counsel for appellees.

And on the eighteenth day of May, A. D. 1896, in the record of the proceedings of said United States circuit court of appeals an order was entered in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

MONDAY, *May* 18, 1896.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSIEG *et al.*, Appellees. } No. 756.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William C. White on behalf of appellant, and, the hour of adjournment having arrived, further argument was postponed until tomorrow.

And on the nineteenth day of May, A. D. 1896, in the record of the proceedings of the said United States circuit court of appeals is an order of submission in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

TUESDAY, *May* 19, 1896.

119 MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE KRUMSIEG *et al.*, Appellees. } No. 756.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause coming on this day for further hearing, argument was continued by Mr. J. B. Richards in behalf of appellees and concluded by Mr. William C. White in behalf of appellant.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the fifth day of November, A. D. 1896, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

120 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1896.

| | |
|---|---|
| MISSOURI, KANSAS & TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Appellees. | No. 756. Appeal from the Circuit Court of the United States for the District of Minnesota. |

Mr. William C. White, for appellant.
Mr. J. B. Richards, for appellees.

Before Caldwell, Sanborn, and Thayer, circuit judges.

*Statement.*

This was a bill filed in the district court of St. Louis county, Minnesota, by Theodore M. Krumseig and Louise Krumseig, the appellees, against The Missouri, Kansas & Texas Trust Company, a corporation organized under the laws of Missouri, the appellant, to cancel a mortgage executed by the appellees to the appellant on real estate in the city of Duluth, upon the ground that the same was void for usury, and upon the further ground that it was a contract for life insurance and void because the appellant was a foreign corporation and had not complied with the laws of Minnesota to entitle it to do business in that State. On the application of the appellant the cause was removed from the State court into the circuit court of the United States for the district of Minnesota on the ground of the diverse citizenship of the parties.

On the twenty-ninth of July, 1890, Theodore M. Krumseig, one of the appellees, made application to the appellant to borrow
121 $2,000. The application was made according to a form prescribed by the appellant and reads as follows:

"I hereby make application to the Missouri, Kansas and Texas Trust Co., of Kansas City, Mo., for a loan of $2,000.00 upon lot No. seven (7), block No. sixty-two (62) of Portland Division addition, city of Duluth, county of St. Louis, State of Minnesota, which property I now own in fee and the abstract to which accompanies this application."

Here follow some statements relating to the domestic and business affairs of Krumseig and a description of the property to be mortgaged. The application then continues: "In consideration of the above premises I agree to execute and deliver to the said company 10 promissory notes, each of the sum of $360, payable in monthly installments of $30.00, commencing at date of signing con-

tract. The said notes cover principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements.

"The contract hereafter to be entered into, if my application should be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing, in case of my death before payment of any unpaid installments, a release of unpaid portion of debt, if I shall have promptly paid previous installments and kept other conditions.

"As part of foregoing condition, I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual fee of $3.00 therefor; and to pay all fees for recording deed of trust or mortgage.

"This application and proposal to stand open for acceptance for ten days from date hereof.

"(Signed) THEODORE M. KRUMSEIG.

"Date July 29th, 1890."

Krumseig submitted to a medical examination such as is required of applicants for life insurance, and executed the promissory notes and mortgage provided for in the application, the latter of which contains the following provision: "And it is further understood by and between the said parties of the first part, their executors, administrators or assigns and the said party of the second part, the Missouri, Kansas & Texas Trust Company, that in case said Theodore M. Krumseig, one of the parties of the first part should die after the execution and delivery of the said notes and this mortgage, and within ten years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be
122 cancelled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly installment that shall have become due prior to his death, according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years and has not without written consent of the party of the second part, visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train or on a steam or sailing vessel for two years."

The bill contains this allegation: "Plaintiffs further allege that said contract whereby upon the death of said Theodore M. Krumseig, as provided in said contract, defendant was to deliver up the notes and cancel the said mortgage of record, was and is and was so understood and agreed by and between all of the parties thereto, when made, to be a life-insurance contract on the life of said Theodore M. Krumseig, that the original application for the said loan of money

hereinbefore mentioned was on one of the printed blanks of the defendant, and said application, signed by said Theodore M. Krumseig, expressly stipulated that said Theodore M. Krumseig should pass such satisfactory medical examination as should be required by defendant, and should pay to the defendant a fee of $3.00 therefor, and that said application for the loan should not be deemed accepted and approved by defendant until a satisfactory medical examination of said Theodore M. Krumseig had been had; and that thereafter the defendant required the said Theodore M. Krumseig to pass and said Krumseig did pass a medical examination and did pay the said fee of $3.00 therefor, and said examination was by said defendant submitted to the Prudential Life Insurance Company, of Newark, N. J., with which company defendant had a contract to report on all of defendant's applications for loans in the said State of Minnesota, and said Prudential Company, having reported thereon, said application was thereupon duly accepted and the notes and mortgage herein described were thereupon executed and delivered to the defendant and plaintiffs allege on their information and belief, that upon favorable report as aforesaid by Prudential Life Insurance Co. and the said Theodore M. Krumseig 'risk,' defendant thereupon entered into a contract with said Prudential Co. whereby said Prudential Co. undertook and agreed to indemnify and save defendant harmless from all loss accruing to defendant under its said contract with the plaintiffs through the possible death of said Theodore M. Krumseig within the life of the said contract."

The answer denies that the contract is usurious, and touching the averment in the bill that it is a contract for life insurance, the answer "Denies the allegations of paragraph 7 of said complaint; denies that said contract was, is or was by either party thereto understood or agreed to be a life-insurance contract; but admits that it was stipulated that said Theodore M. Krumseig should pass
123 such satisfactory medical examination as should be required by defendant, and should pay a fee therefor to the medical examiner of $3.00, and that said examination was passed and said fee so paid and said examination submitted to the Prudential Life Insurance Company and that said company reported favorably thereon; but defendant denies that said Prudential Company undertook or agreed to indemnify and save defendant harmless from all or any loss which might accrue to defendant under its contract with plaintiffs through the possible death of said Krumseig or otherwise, and alleges that the contract with said Prudential Company was the ordinary and usual contract with it for the insurance for the period of said loan, of defendant's insurable interest in the life of said plaintiff."

The agreement between the Prudential Insurance Company and the appellant reads as follows:

"This agreement made and entered into this twenty-seventh day of February, in the year one thousand, eight hundred and eighty-nine by and between the Prudential Insurance Company of America, of Newark, N. J., hereinafter designated as the Prudential, and the

Missouri, Kansas & Texas Trust Company, of Kansas City, Mo., hereinafter designated as the trust company.

"Witnesseth: That the Prudential in consideration of the premiums hereinafter mentioned and upon the following terms and conditions agrees to insure in favor of the trust company the lives of certain persons whose physical condition may be acceptable to the said Prudential:

"First. The persons whose lives are proposed for insurance must be debtors unto the trust company in a sum equal, at least, to the amount of insurance requested.

"Second. The policies of insurance shall be issued upon the renewable reducing term plan. They may be severally renewed for not more than ten successive years and shall be non-participating. The premiums shall be adjusted on the basis of a term insurance for one year and the amount of insurance under each policy shall decrease each year according to the provisions of the seventh section of this agreement.

"Third. The trust company shall furnish to the Prudential for approval a list of medical examiners by whom the persons whose lives are to be insured shall be examined.

"Fourth. The expense of conducting the examination shall be borne by the Prudential.

"Fifth. The rates of premium per $1,000 shall be as given in the following table, by which the rate to be paid in each and every year over which each policy extends is that corresponding to the actual age of the life insured in that year.

124 *Premiums per* $1,000.

| Age. | Annual. | Semi-annual. | Quarterly. |
|---|---|---|---|
| 21 | $9 50 | $4 94 | $2 52 |
| 22 | 9 64 | 5 01 | 2 55 |
| 23 | 9 81 | 5 10 | 2 60 |
| 24 | 9 99 | 5 19 | 2 65 |
| 25 | 10 17 | 5 29 | 2 70 |
| 26 | 10 37 | 5 39 | 2 75 |
| 27 | 10 57 | 5 50 | 2 80 |
| 28 | 10 80 | 5 62 | 2 86 |
| 29 | 11 02 | 5 73 | 2 92 |
| 30 | 11 27 | 5 86 | 2 99 |
| 31 | 11 52 | 5 99 | 3 05 |
| 32 | 11 80 | 6 14 | 3 13 |
| 33 | 12 09 | 6 29 | 3 20 |
| 34 | 12 38 | 6 44 | 3 28 |
| 35 | 12 70 | 6 60 | 3 37 |
| 36 | 13 02 | 6 77 | 3 45 |
| 37 | 13 36 | 6 95 | 3 54 |
| 38 | 13 74 | 7 14 | 3 64 |
| 39 | 14 11 | 7 34 | 3 74 |
| 40 | 14 50 | 7 54 | 3 84 |

| Age. | Annual. | Semi-annual. | Quarterly. |
|---|---|---|---|
| 41 | $14 93 | $7 76 | $3 96 |
| 42 | 15 41 | 8 01 | 4 08 |
| 43 | 15 97 | 8 30 | 4 23 |
| 44 | 16 65 | 8 66 | 4 41 |
| 45 | 17 42 | 9 06 | 4 62 |
| 46 | 18 33 | 9 53 | 4 86 |
| 47 | 19 31 | 10 04 | 5 12 |
| 48 | 20 37 | 10 59 | 5 40 |
| 49 | 21 51 | 11 19 | 5 70 |
| 50 | 22 77 | 11 84 | 6 03 |
| 51 | 24 10 | 12 53 | 6 39 |
| 52 | 25 58 | 13 30 | 6 78 |
| 53 | 27 18 | 14 13 | 7 20 |
| 54 | 28 88 | 15 02 | 7 65 |
| 55 | 30 75 | 15 99 | 8 15 |
| 56 | 32 78 | 17 05 | 8 69 |
| 57 | 34 92 | 18 16 | 9 25 |
| 58 | 37 25 | 19 37 | 9 87 |
| 59 | 39 80 | 20 70 | 10 55 |
| 60 | 42 63 | 22 17 | 11 30 |
| 61 | 46 02 | 23 93 | 12 20 |
| 62 | 49 73 | 25 86 | 13 18 |
| 63 | 53 75 | 27 95 | 14 24 |
| 64 | 58 16 | 30 24 | 15 41 |
| 65 | 62 92 | 32 72 | 16 67 |
| 66 | 68 13 | 35 43 | 18 05 |
| 67 | 73 79 | 38 37 | 19 55 |
| 68 | 78 89 | 41 54 | 21 17 |
| 69 | 86 45 | 44 95 | 22 91 |
| 70 | 93 56 | 48 65 | 24 79 |

125 "Sixth. The trust company shall be allowed a commission of twenty-five per cent. on the premiums paid in the first year of each policy and a commission of ten per cent. on the premiums paid in each and every year thereafter during the continuance of the policy.

"Seventh. The amount of insurance to be mentioned in each policy shall be the amount of insurance at the beginning of its first year, and the amount of insurance under each and every policy shall decrease year by year in the proportion exhibited in the appended table, wherein the initial amount is $1,000.

| | |
|---|---|
| " First year insurance is | $1,000 |
| Second " " " | 902 |
| Third " " " | 829 |
| Fourth " " " | 748 |
| Fifth " " " | 660 |
| Sixth " " " | 562 |
| Seventh " " " | 455 |
| Eighth " " " | 337 |
| Ninth " " " | 207 |
| Tenth " " " | 70 |

"Eighth. When claim is made by the trust company for the insurance under any policy, the said trust company shall furnish to the Prudential proofs of the death of the insured on the forms to be furnished by the Prudential for that purpose. It is also understood and agreed that no claim shall be made by the trust company for an amount greater than the amount of indebtedness of the person whose life was insured to the trust company at the time of his, or her, death.

"Ninth. Unless otherwise arranged by special agreement the premiums on the policies issued by the Prudential shall be due and payable at the home office of the said Prudential in the city of Newark, New Jersey, on the date mentioned in the policies, and if not so paid on any policy or policies, such corresponding policy or policies shall be null and void.

"Tenth. The policies of insurance are issued by the Prudential and accepted by the trust company with the distinct understanding and agreement that if any of the insured within two years from the date of the policy shall commit suicide, or shall visit, or travel, in the torrid zone without the written consent of the Prudential, or shall personally engage in any specially hazardous occupation or pursuit, as mentioned in the application, then the policies of insurance upon their lives shall cease and determine and be of non effect and void.

"Eleventh. The obligation of the Prudential to issue new policies to the trust company may be terminated at any time after thirty days' notice to the trust company.

126 "In witness whereof the parties to this agreement have by their respective presidents and secretaries signed and delivered the same the day and year first above written.

JOHN F. DRYDEN,
*President Prudential Ins. Co. of America.*
EDWARD S. JOHNSON,
*Secretary Prudential Ins. Co. of America.*
J. E. McKEIGHAN,
*President Missouri, Kansas & Texas Trust Co.*
E. J. DAVISON,
*Secretary Missouri, Kansas & Texas Trust Co.*"

The answer admits that the defendant has not complied with the laws of Minnesota respecting the transaction of life-insurance business in the State.

The circuit court rendered a decree cancelling the mortgage, 17 Fed. Rep. 350. The defendant thereupon appealed the cause to this court.

CALDWELL, *J.*, after stating the case as above, delivered the opinion of the court:

The case of Missouri, Kansas & Texas Trust Co. *v.* McLachlan, 59 Minn. 468, involved the construction of one of the appellant's contracts identical in its provisions with the one here in suit. Judge Mitchell, speaking for the court in that case said: "We had supposed

that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this State; but we shall take plaintiff at its word, and assume, without deciding, that it is not a life-insurance contract, and hence that the laws of this State prohibiting and declaring invalid such contracts made by a foreign insurance company which has not complied with our statutes are inapplicable. It remains to be considered whether the facts justify the conclusion that the scheme was devised as a cover for usury. It was on this ground that the trial court held the notes and mortgage void." And the court held that the scheme embodied in the application, notes and mortgage, was merely a colorable device to cover usury and that the notes and mortgage were usurious and void. This judgment of the supreme court of Minnesota is directly in point in the case at bar on the question as to whether the contract is usurious.

The statutes of Minnesota fix the legal rate of interest at seven per cent. and the highest conventional rate at ten per cent., and declare that "all bonds, bills, notes, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever, and all deposits of goods, or anything whatever, whereupon or whereby
127 there shall be reserved, secured or taken any greater sum or value for the loan or forbearance of any money, goods, or things in action, than is above prescribed, shall be void," with exceptions that have no relation to this case. It is also provided that any person who has paid usurious interest may recover it back by action brought within two years after its payment, and that "where the original holder of an usurious note sells the same to an innocent purchaser, the maker of said note or his representatives shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note." Statutes of Minnesota, 1888, chap. 23, sections 1, 2, 3 and 4.

The loan was to be repaid in monthly instalments. Notes were given for these instalments which included both principal and interest. The payment of each monthly instalment reduced the principal of the debt by the amount of the principal included therein, and it extinguished the interest on that sum. Without reciting the testimony or setting out the extended calculations of the experts, it is sufficient to say that viewing the contract as a loan of money, the interest charged on the loan in excess of ten per cent. is nearly $500, after allowing the appellant the cost to it of the policy of insurance on Krumseig's life taken out in its favor upon the "renewable reducing plan" under its contract with the Prudential Insurance Company. It is immaterial what name is given to this life insurance which the appellant required Krumseig to take out in its favor as a condition of making the loan. By whatever name called, it was taken out for the benefit of the appellant at the cost and ex-

pense of Krumseig. Allowing the cost of this insurance to the appellant to be a legitimate charge, the fact remains that the contract stipulates for a large sum in excess of ten per cent.

It is urged that the obligation to repay the loan is contingent upon Krumseig's living, and that in the event of his death if he has "promptly paid previous instalments and kept other conditions," the appellant is bound to "release the unpaid portion of the debt." But in the contingency of Krumseig's death and the release of the unpaid portion of the debt, the appellant is indemnified against loss at Krumseig's expense, for he was made to purchase the insurance for the appellant's benefit. On this branch of the case, the supreme court of Minnesota in Missouri, Kansas & Texas Trust Co. *v.* McLachlan, *supra*, said: "The peculiar and unusual provisions of this contract themselves constitute intrinsic evidence sufficient to justify the finding of the existence of every essential element of usury, viz: That there was a loan, that the money was to be returned at all events, and that more than lawful interest was stipulated to be paid for the use of it. The only one of these which could be seriously claimed to be lacking was that the money was not to be paid at all events, but only upon a contingency, to wit, the continuance of the life of McLachlan; but the facts warrant the inference that this contingency was not *bona fide*, but was itself a mere contrivance to cover usury. The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether
128 the contingency be a real one, or a mere shift and device to cover usury. The circumstances would justify a finding that the contingency in this case was merely a colorable device to cover usury." We concur in the views here expressed and they find support in other cases. Missouri Valley Ins. Co. *v.* Kittle, 1 McCrary, 234; National Life Ins. Co. *v.* Harvey, 2 McCrary, 576; Clague *v.* Creditors, 2 La., 114.

But conceding that the notes and mortgage are void for usury, it is contended that the appellees cannot obtain the relief they seek except upon the condition of paying or tendering the principal of the loan and lawful interest. Undoubtedly, this is the general equity rule, but the rule has been abrogated by statute in the State of Minnesota. Construing the statute on the subject of usury which we have cited, the supreme court of the State upon full consideration, held that its provisions were intended to apply as well to actions brought by borrowers for relief against usurious notes or other securities as to those brought against them in which the usury is set up by way of defense; and that in the former equally with the latter, the note or other security whenever its usurious character is made to appear, should be declared void and ordered canceled and delivered up unconditionally and without requiring the borrower to repay the lender the amount loaned with legal interest or any part of it. Scott *v.* Austin, 36 Minn. 460, 464, reaffirmed in Exley *v.* Berryhill, 37 Minn. 182.

This decision was pronounced in a case where the mortgagor, without paying or tendering any part of the unpaid mortgage debt

and interest, brought a bill to set aside a sale to the mortgagee of the mortgaged premises under a power of sale, and to cancel the mortgage and notes upon the ground that the contract was usurious. The court found the contract was usurious and thereupon rendered a decree setting aside the sale of the mortgaged premises to the mortgagee under the power of sale contained in the mortgage, and requiring the notes and mortgage to be surrendered for cancellation and the mortgage canceled of record. The express holding of the court was that the complainant was entitled to this relief under the statute without paying or tendering any part of the debt or interest. The decision is grounded solely on the statute. The court recognizes the general rule of equity that a maker of a usurious contract cannot maintain a bill to cancel the same for usury without first paying or offering to pay the principal sum borrowed with lawful interest. The court holds, however, that this rule of equity is abrogated by the statute which we have cited, and that under that statute conveyances and mortgages made to secure a usurious contract are void and that the statute makes it obligatory on the court when the usury is established at the suit of the maker of the usurious contract to annul and cancel the contract with all conveyances given to secure performance of the same, without requiring the plaintiff to pay any part of the usurious debt or interest.

The judicial department of every government is the rightful exponent of its laws and the construction placed upon the statute of Minnesota by the supreme court of the State is conclusive in this court. The judicial interpretation of a State statute by the
129 supreme court of the State becomes in legal effect a part of the text of the statute itself. Bergman *v.* Bly, 27 U. S. App. 650, 13 C. C. A. 319.

Other States have statutes similar to the Minnesota statute, among them, New York (1 Pomeroy's Eq. Juris. sec. 391, note 1; Bissell *v.* Kellogg, 60 Barb. 617) and Arkansas. The Arkansas statute is more comprehensive than the Minnesota or New York statute, in that it extends the right to have the usurious securities canceled to the vendees, assignees or creditors of the maker of the usurious contract; it declares that every conveyance or lien given to secure a usurious contract "may be canceled and annulled at the suit of the maker of such usurious contract or his vendees, assigns, or creditors;" and in terms provides, that "neither the maker of the usurious contract nor his vendees, assigns or creditors * * * shall be required to tender or pay any part of the usurious debt or interest as a condition of having such contract and any conveyance, mortgage, pledge or other lien given to secure its payment or executed in furtherance thereof, enjoined, canceled and annulled, and any rule of law, equity or practice to the contrary is abrogated." Sandels & Hill's Dig. Stats. of Arkansas, 1894, chap. 110, secs. 5086, 5088.

A further contention of the appellant is that a State statute which changes a rule of equity law is not obligatory on a Federal court and that, therefore, the statute of Minnesota providing for the unconditional cancellation of conveyances, mortgages and other liens given to secure the payment of usurious contracts will not be given

effect by a Federal court of equity sitting in that State in cases where it applies. It will be conceded that if this suit had remained in the State court where it was originally brought, that the appellees would have had the benefit of the State statute. Did they lose that right by the removal of the cause into the Federal court? The practice in the Federal courts in suits in equity is regulated by themselves and by rules established by the Supreme Court of the United States under the authority of an act of Congress, and are uniform throughout the United States and cannot be varied by State laws. But the question in this case is not one of mere practice but of substantive law. The bill seeks to cancel a mortgage on real estate situated in the State of Minnesota; the mortgage is a cloud upon the title of the complainant which under the statute of Minnesota he is entitled to have removed unconditionally. The mode of proceeding to accomplish this result is the same in the Federal courts that it is in the State courts, namely, by bill in equity. The statute is not, therefore, a practice act; it abrogates a rule of equity law and secures to the maker of the usurious securities a substantive right which may be enforced according to the established and well-understood equity practice. It is immaterial whether this right be called legal or equitable; it is an absolute right, and one of which no court can deprive the party. Its enforcement is not dependent on the discretion of the chancellor, nor can a rule of decision based on the supposed authority of the maxim that "he who asks equity must do equity," prevail over a positive statute expressly abrogating that rule of decision. When a court of equity is called upon
130 to deal with a right given by statute, then it accepts and acts upon that other maxim that "equity follows the law." It is not competent for any court to take from the citizen a right secured to him by a valid exercise of legislative power. "Rights," says the Supreme Court of the United States, "under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise." *In re* Parker, 131 U. S. 221.

In the absence of a statute, the equity rule of decision that we are considering prevails alike in the State and Federal courts, and if a statute is ineffectual to abrogate it in one court it is not perceived why it is not equally ineffectual to abrogate it in the other, and the result would be to make a judge-made rule of law paramount to the legislative will. A rule of equity law is no more beyond legislative control than a rule of the common law; both may be abrogated at the pleasure of the legislature. The statute was designed to make the usury laws of the State effective. It is well known that the equity rule of decision, the application of which the appellant is insisting on in this case, rendered the usury law nugatory in many cases. By taking a mortgage with a power of sale the usurer was sure of his mortgage securities to the extent of the principal of the loan and legal interest, notwithstanding the statute declared the contract and securities void. Moreover, the Minnesota statute deals with conveyances and titles to real estate and to the removal of clouds therefrom, and it never was doubted that the Federal courts will enforce the right given by the State law in such cases, in the mode appro-

priate to those courts. The laws of the State in which land is situated control exclusively its alienation and transfer and the effect and construction of instruments intended to convey it; (United States *v.* Fox, 94 U. S. 315; United States *v.* Crosby, 7 Cranch 115; Clark *v.* Graham, 6 Wheat. 577; McGoon *v.* Scales, 9 Wall. 23) and all such laws in existence when a contract in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract. Brine *v.* Hartford Fire Ins. Co., 96 U. S. 627.

"The State legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subject of investigation. And such is the constant course of the Federal courts. * * * The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy, so as to give effect to State legislation and State policy; not departing, however, from what legitimately belongs to the practice of a court of chancery." Clark *v.* Smith, 13 Pet. 195.

131 It would be an unheard of doctrine to say that a State statute affecting conveyances and the removal of clouds upon the title of real estate and giving full effect to an established State policy on a subject confessedly within the exclusive domain of State legislation should not be obligatory on a Federal court held in the State in a case coming within the purview of the statute. No decision of the Supreme Court of the United States has been cited, and it is believed none can be found supporting such a doctrine.

Under the operation of the rule here contended for, we should have two rules of decision on the same facts; one for the State court and one for the Federal court, the former based on a valid exercise of the legislative power of the State, and the latter based on nothing but a rule of decision of chancery courts having no legislative sanction whatever. As a result of such diverse rules of decision, each party to a suit would engage in an unseemly struggle to get into that jurisdiction whose rule of decision favored his side of the case. Indeed, this is precisely what occurred here. This case was removed from the State to the Federal court in the hope that the Federal court would disregard the State statute. There are a few cases in which the rule of decision in the Federal and State courts may vary, but they relate to questions of general commercial law which are not dependent upon any statute. Whenever a right is given by State statute, it is obligatory on both courts to enforce it.

The insurance feature of the contract remains to be considered. To explain and define the nature of the contract, the appellant called three expert witnesses. Mr. Lunger, the actuary of the Prudential Insurance Company, in his testimony says: "In brief, the contract is a combination of a mortgage loan payable in instalments, and a life-insurance policy." Mr. Stillwell, the president of the appellant company says: "I invented the plan on which this loan was made;" and he says his invention consists in "combining the loan and the insurance into one contract." Mr. Cone, secretary of the appellant company, testifies that "the contract involved in this case is similar to a ten-year loan and a ten-year endowment policy. The borrower in this case has all of the benefits and advantages of both a ten-year loan and a ten-year endowment policy on his life, and other additional benefits and advantages. In fact the only difference between this contract and a straight loan and endowment policy, consists in the additional and superior advantages which the borrower has, under this contract, over and above those he would have in case he borrowed money for ten years and then insured his life for ten years on the endowment plan." Accepting the construction of this contract given by the appellant's expert witnesses, one of whom, to use his own language, "invented the plan," we must hold that the contract is, in the language of another of appellant's witnesses, "a combination of a mortgage loan * * * and a life-insurance policy."

Viewed as a contract for life insurance either in whole or in part, it is void for non-compliance with the insurance laws of the State of Minnesota. These laws impose numerous conditions on
132 foreign insurance companies doing business in the State and punish criminally the officers and agents of any insurance company doing business in the State contrary to their provisions. Statutes of Minn. 1878, chap. 34, title 6, sections 291–297.

It is admitted that the appellant did not qualify itself to do an insurance business in the State. Upon these facts, two familiar rules of decision come into play; one, that a penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue though there are no prohibitory words in the statute; and the other is that a court of justice will give no assistance to the enforcement of contracts which the law of the land has interdicted. Swann *v.* Swann, 21 Fed. Rep. 299, 306.

Applying these well-settled rules to the contract of insurance, it must be held illegal and void, and such we understand to be the holding of the supreme court of Minnesota. Seamans, receiver, *v.* Christian Brothers Mill Co, Ms. Op. supreme court of Minnesota, October term, 1896.

A court of equity will not require the appellees to await a suit against them on the illegal contract to which they have an absolute defense, but will relieve them by ordering the contract executed in violation of the statute to be surrendered and canceled. The remedy of cancellation is simply the equitable proceeding identical with the setting up of the illegality as a defense to defeat a recovery at law and thus get rid of the contract as a binding executory obligation.

2 Pom. Eq. Juris. sec. 940. The parties in this case are not *in pari delicto*. The appellant is the party responsible for the contract. It must be conclusively presumed to know that it was doing an illegal act, and it induced the appellees to enter into the contract of insurance in ignorance of its illegality. The appellees had a right to presume that the appellant had qualified itself to do an insurance business in the State. Ehrman *v.* Teutonia Ins. Co., 1 Fed. Rep. 471. Where one party to an illegal executory contract is comparatively the more innocent, a court of equity may grant him full affirmative relief by cancelling the contract. 2 Pom. Eq. Juris., sections 941, 942.

The decree of the circuit court is affirmed.

THAYER, *J.*, concurring:

I concur in the foregoing order affirming the decree of the circuit court on the ground stated in the opinion-in-chief, that the loan was usurious, and that the agreement under and by virtue of which the same was made was a mere device to cover usury. I also concur in the view that the Minnesota statute referred to in the opinion, as construed by the highest court of the State, creates a new or enlarged equitable right, which the Federal courts, as well as the State courts, must enforce. Reynolds *v.* Crawfordsville Bank, 112 U. S., 405, 410; Broderick's Will, 21 Wallace, 503, 520; *Ex parte* McNeil, 13 Wallace, 236, 243. I express no opinion with reference to the question whether the contract was voidable on the ground that it was entered into in violation of the insurance laws of the State of Minnesota.

SANBORN, *J.*, dissenting:

I dissent from the conclusion of the majority of the court in this case on the ground that "the equity jurisdiction conferred on the Federal courts is the same as that which the high court of chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union" (Payne *v.* Hook, 7 Wall., 425, 430); that it "does not receive any modification from the legislation of the States or the practice of their courts having similar powers" (Green's Administratrix *v.* Creighton, 23 How., 90, 105); that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case, that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask. Tiffany *v.* Boatman's Institution, 18 Wall., 375, 385; Robinson *v.* Campbell, 3 Wheat., 211, 222; United States *v.* Howland, 4 Wheat., 108, 114; Suydam *v.* Broadnax, 14 Peters, 67; The Union Bank of Tennessee *v.* Jolly's Administrators, 18 How., 503, 507; Noonan *v.* Lee, 2 Black, 499.

Filed November 5, 1896.

And on the fifth day of November, A. D. 1896, in the record of the proceedings of the said United States circuit court of appeals is an entry of decree in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

THURSDAY, *November* 5, 1896.

MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant,
*vs.*
THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Appellees. } No. 756.

Appeal from the circuit court of the United States for the district of Minnesota.

134 This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Theodore M. Krumsieg and Louise Krumsieg have and recover against the Missouri, Kansas and Texas Trust Company the sum of twenty dollars for their costs herein and have execution therefor.

November 5, 1896.

And on the tenth day of December, A. D. 1896, in the record of the proceedings of the said circuit court of appeals is an order in said cause granting leave to file petition for a rehearing in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

THURSDAY, *December* 10, 1896.

MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant,
*vs.*
THEODORE M. KRUMSIEG *et al.*, Appellees. } No. 756.

Appeal from the circuit court of the United States for the district of Minnesota.

On motion of the appellant leave is granted to said appellant to file a petition for a rehearing in this cause forthwith.

And on the tenth day of December, A. D. 1896, a petition for a rehearing was filed in said cause by counsel for appellant in the following words, to wit:

135 United States Circuit Court of Appeals, Eighth Circuit.

MISSOURI, KANSAS & TEXAS TRUST COMPANY, Appellant,
*vs.*
THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Appellees.

*Petition for Rehearing.*

To the honorable the judges of the United States circuit court of appeals of the eighth circuit:

Now comes the appellant, Missouri, Kansas & Texas Trust Company, and respectfully petitions the court to set aside and vacate the judgment rendered by them in the above-entitled cause, affirming the judgment of the court below, and to grant to said appellant a rehearing thereof for the following reasons:

*Point* I.

The court erred in holding that in the case of The Missouri, Kansas & Texas Trust Company *vs.* McLachlan, 59 Minn., 468, involving the construction of one of the appellant's contracts
136 identical in its provisions with the one here in suit, the judgment of the supreme court of Minnesota is directly in point as applied to the case at bar on the question of usury in the contract, for the reason that the evidence in said case presented an entirely different state of facts upon which the judgment of the court was passed, as appellant in this case will show.

*Point* II.

The court erred in holding that the interest charged on the loan in the case at bar in excess of ten (10) per cent. is nearly five hundred (500) dollars or any sum, after allowing the appellant the cost to it of the policy of insurance on Krumseig's life, taken out under its contract with the Prudential Insurance Company.

*Point* III.

The court erred in assuming that the amount charged to appellees above the amount paid to the Prudential Insurance Company is the amount that should be calculated as interest; as this appellant is prepared conclusively to show.

*Point* IV.

The court erred in holding that in the contingency of Krumseig's death and the release of unpaid portion of the debt the appellant is indemnified against loss, either at Krumseig's expense or otherwise; a proper and careful calculation proving the contrary.

*Point* V.

The court erred in holding that a State can by legislation abrogate a rule of equity otherwise of universal application, and

through the judiciary of the State enforce that abrogation upon the Federal courts sitting in equity.

137 *Point* VI.

The court erred in finding on the testimony of witnesses in untechnical language and in spite of the conclusions therefrom of the same witnesses to the contrary, that the contract in question in the case at bar combined within its terms a life-insurance policy: more especially as a fair and careful consideration of the calculations made from the actual figures paid conclusively shows the contrary.

*Point* VII.

The court erred in various statements of facts in the case and the deductions therefrom; all of which will be particularized in the brief of appellant upon a rehearing in this matter.

This case is a test case for various others and deserves the most careful and candid consideration of the courts; and the appellant respectfully begs leave of the court to submit a brief in this matter as his argument upon the points involved.

Dated Duluth, Minn., December 5, 1896.

WILLIAM C. WHITE,
*Attorney for Appellant.*

*Certificate of Counsel.*

I, William C. White, counsel for Missouri, Kansas & Texas Trust Company, the appellant in the within-entitled cause, do hereby certify that the within and foregoing petition for rehearing thereof is made in good faith, and in the honest belief that the same should be granted. And I do further certify that in my opinion the grounds of the application as therein stated are sufficient in
138 law; and that said petition is not made for the purpose of vexation or delay, but that justice may be done. And I do further certify that the reason that the application was not sooner made is that I, said counsel, was continuously absent from Duluth and in the East until about ten days after notice of the decision in said cause was received from the clerk of said court, and that a copy of the opinion was, upon my return, immediately ordered by me and was not received until the May term of said court was closed; and that thereupon I immediately wired to Justice Walter H. Sanborn and received response at once from him; copies of which telegrams are printed below.

Dated Duluth, December 5, 1896.

WILLIAM C. WHITE,
*Att'y for Appellant.*

"DULUTH, *Dec. 4th*, 1896.

"To Hon. Walter H. Sanborn, judge U. S. circuit court appeals, St. Paul, Minn:

"I was in the East when notice decision came in case Krumseig *vs.* Missouri, Kansas & Texas Trust Company. Have just received

opinion and desire rehearing, but understand term about closing. Will you enter order extending time to file petition for thirty days? Please answer.

"WM. C. WHITE."

"DEC. 4, 1896.

"Dated St. Paul, Minn.

"To Wm. C. White:

"May term here has closed, but court will probably allow you to file petition at December term, which opens in St. Louis Monday next.

"WALTER H. SANBORN."

Endorsed: Filed by leave of court December 10, 1896. John D. Jordan, clerk.

139 And on the fourteenth day of December, A. D. 1896, in the record of the proceedings of said United States circuit court of appeals is an order denying the petition for a rehearing in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

MONDAY, *December* 14, 1896.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSIEG *et al.*, Appellees. } No. 756.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on this day to be heard upon the petition for a rehearing filed by counsel for the appellant.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

December 14, 1896.

And on the eighteenth day of January, A. D. 1897, a petition by counsel for appellant for an order to recall the mandate of this court was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

MISSOURI, KANSAS & TEXAS TRUST COMPANY, Appellant, *vs.* THEODORE M. KRUMSEIG and LOUISE KRUMSEIG, Appellees.

To the honorable the United States circuit court of appeals for the eighth circuit:

The above-named appellant, Missouri, Kansas & Texas
140 Trust Company, petitioner, by this its petition alleges that in the above-entitled matter the judgment of this honorable

court was rendered on or about the 6th day of November, 1896, affirming the judgment of the court below, and that thereafter and on or about the 5th day of December, 1896, a petition for a rehearing of said matter was filed by said appellant, which was thereafter and on the 14th day of December, 1896, denied.

Your petitioner further says that notice of the denial of said petition for a rehearing in said matter was mailed by the clerk of said court in due season and reached the office of William C. White, counsel for petitioner, on the 17th day of December, 1896, and that thereupon said William C. White immediately wrote and on said day mailed to the general counsel of appellant, at Kansas City, Missouri, the notice of the denial of rehearing in said matter, and that no opinion had been filed, and suggested to said general counsel the importance of the question involved, upon which this honorable court were at variance, to wit, the question involving the jurisdiction of the circuit courts in certain equity cases, and suggested further to said counsel that said matter be presented to the Supreme Court of the United States upon an application to that court for a writ of certiorari for the reviewal of said case. Your petitioner further alleges that no response was received to said letter of December 17th, 1896, to said general counsel, and that on the 31st day of December, 1896, said William C. White again wrote to the general counsel of the appellant, at Kansas City, Missouri, again calling attention to the status of the case and asking for an answer to the letter of December 17th aforesaid, and that thereupon and on the 7th day of January, 1897, said general counsel, at Kansas City, wrote said William C. White, replying to said letter of December 17th, 1896, and requested said William C. White, as counsel in said case, to take such steps immediately as might be necessary to have said case reviewed by the Supreme Court of the United States upon certiorari proceedings as aforesaid, which letter was received by said William C. White on the 9th day of January, 1897.

141 Your petitioner further alleges that on the 6th day of January, 1897, said William C. White received notice from the clerk of this court, of date January 4th, 1897, stating that the mandate in this case was on said date issued and sent to the clerk of the United States circuit court at Duluth, Minnesota; and your petitioner alleges that in the previous correspondence between said William C. White and the general counsel for appellant said William C. White had urged counsel to respond immediately, but had not stated that the time for issuing said mandate would expire on January 4th or 5th, 1897, and upon information and belief alleges that said general counsel were not aware of that fact, but took the time necessary to look into the matter at Kansas City, Missouri, and believed their notification of January 7th, 1897, to be within the sixty days for issuing said mandate, and said William C. White took no steps for staying said mandate for the reason that he supposed that general counsel did not wish so to proceed.

Your petitioner further alleges that this petition is made for the purpose of proceeding with such application to the Supreme Court of the United States for the writ of certiorari and is made in good

faith; that petitioner has ordered a complete transcript of the records in said case from the office of the clerk of this honorable court to accompany the application as required by rule 37 of the Supreme Court in such matters, together with sufficient copies of the printed record of this court for filing with such application, and that application to the Supreme Court of the United States, as aforesaid, will be presented to that court without delay.

Wherefore your petitioner prays that the mandate in this case, heretofore issued and sent to the clerk of the United States circuit court at Duluth as aforesaid, may be by this court recalled in order that petitioner may prosecute such application as aforesaid.

Dated January 15th, 1897.

WM. C. WHITE,
*Attorney for Petitioner.*

142 STATE OF MINNESOTA, } ss:
*County of St. Louis,* }

William C. White, being duly sworn, says that he is the counsel for appellant in the within-entitled matter, and as such makes this verification, and that the same is made by him in the place of appellant or its officers for the reason that they are absent from the State of Minnesota, within which affiant resides; that he has read the foregoing petition and knows the contents thereof, and that the same is true except as to the matters therein stated on information and belief, and as to *the* matters he believes — to be true.

WILLIAM C. WHITE.

Subscribed and sworn to before me this Jan. 15, 1897.

[SEAL.] DANIEL WAITE,
*Notary Public, St. Louis County, Minn.*

Endorsed: Original. U. S. circuit court of appeals, eighth district. Missouri, Kansas and Texas Trust Company, appellant, against Theodore M. Krumseig and Louise Krumseig, appellees. Petition for recall of mandate. Filed Jan. 18, 1897. John D. Jordan, clerk. Wm. C. White, attorney for appellant, 706–708 Torrey building, Duluth, Minn.

And on the twentieth day of January, A. D. 1897, in the record of the proceedings of said United States circuit court of appeals is an order recalling the mandate in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1896.

WEDNESDAY, *January* 20, 1897.

MISSOURI, KANSAS AND TEXAS TRUST COMPANY, Appellant,
*vs.*
THEODORE M. KRUMSIEG *et al.*, Appellees. } No. 756.

143 Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on this day to be heard upon the motion of counsel for appellant for an order to recall the mandate of this court to the court below pending an application to the Supreme Court of the United States for a writ of certiorari.

And it appearing that the mandate of this court was issued to the circuit court of the United States for the district of Minnesota on the 5th day of January, A. D. 1897, under the rule of this court, it is, on consideration of the said motion, now here ordered by this court that said mandate be, and the same is hereby, recalled, and the same is ordered to be held by the clerk of this court for a period of sixty days from and after this date pending the said application for a writ of certiorari.

January 20, 1897.

144 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to 143, inclusive, contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in a certain cause in said court wherein The Missouri, Kansas and Texas Trust Company was appellant and Theodore M. Krumseig *et al.* were appellees, No. 756, May term, 1896, as full, true, and complete as the original of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this twenty-seventh day of January, A. D. 1897.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

145 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Missouri, Kansas & Texas Trust Company is appellant and Theodore M. Krumseig and Louise Krumseig are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
146 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

*Return to Writ of Certiorari.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, in obedience to the command of the within writ and in pursuance of the stipulation of the parties, the original of which is hereto attached, do hereby certify that the transcript of record furnished with the application for a writ of certiorari to the Supreme Court of the United States contains a full, true, and complete transcript of the record and all things concerning the same as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this twenty-sixth day of March, A. D. 1897.

JOHN D. JORDAN,
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

In the Supreme Court of the United States.

*Ex Parte* MISSOURI, KANSAS & TEXAS TRUST COMPANY, Petitioners.

Petition for writ of certiorari requiring the circuit court of appeals for the eighth circuit to certify to the Supreme Court for its review and determination the case of Missouri, Kansas & Texas Trust Company, appellant, *vs.* Theodore M. Krumseig and Louise Krumseig, appellees.

*Stipulation.*

In the above-entitled matter, being No. 728 of the October term, 1896, of the Supreme Court of the United States, a writ of certiorari in the case of Missouri, Kansas & Texas Trust Company, appellant, *vs.* Theodore M. Krumseig and Louise Krumseig, appellees, having been granted on the 15th day of March, 1897, and having been duly issued out of said court on the 20th day of March, 1897, as prayed by the petition in said matter, it is—

Stipulated and agreed between the counsel for the appellant and appellees that the certified copy of the transcript of record filed with the petition for said writ of certiorari may be taken as the required return to the said writ.

Dated March 23, 1897.

WM. C. WHITE,
*Attorney for Appellant.*
J. B. RICHARDS,
*Attorney for Appellees.*

147 [Endorsed:] 728, 16,507. Mar. 29, '97.

[Endorsed:] No. 16,507. Supreme Court of the United States. No. 728, October term, 1896. The Missouri, Kansas & Texas Trust Co. *vs.* Theodore M. Krumseig & Louise Krumseig. Writ of certiorari and return. Filed Mar. 26, 1897. John D. Jordan, clerk. Office Supreme Court U. S. Filed Mar. 29, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,507. U. S. C. C. of appeals, 8th circuit. Term No., 316. The Missouri, Kansas & Texas Trust Company, petitioner, *vs.* Theodore M. Krumseig and Louise Krumseig. Filed March 8th, 1897.

No. 928. 346.

Brief of White for Petitioner.

Filed Mar. 8, 1894.

Supreme Court, U.S.
MAR 8 1897
CLERK

# In the Supreme Court of the United States

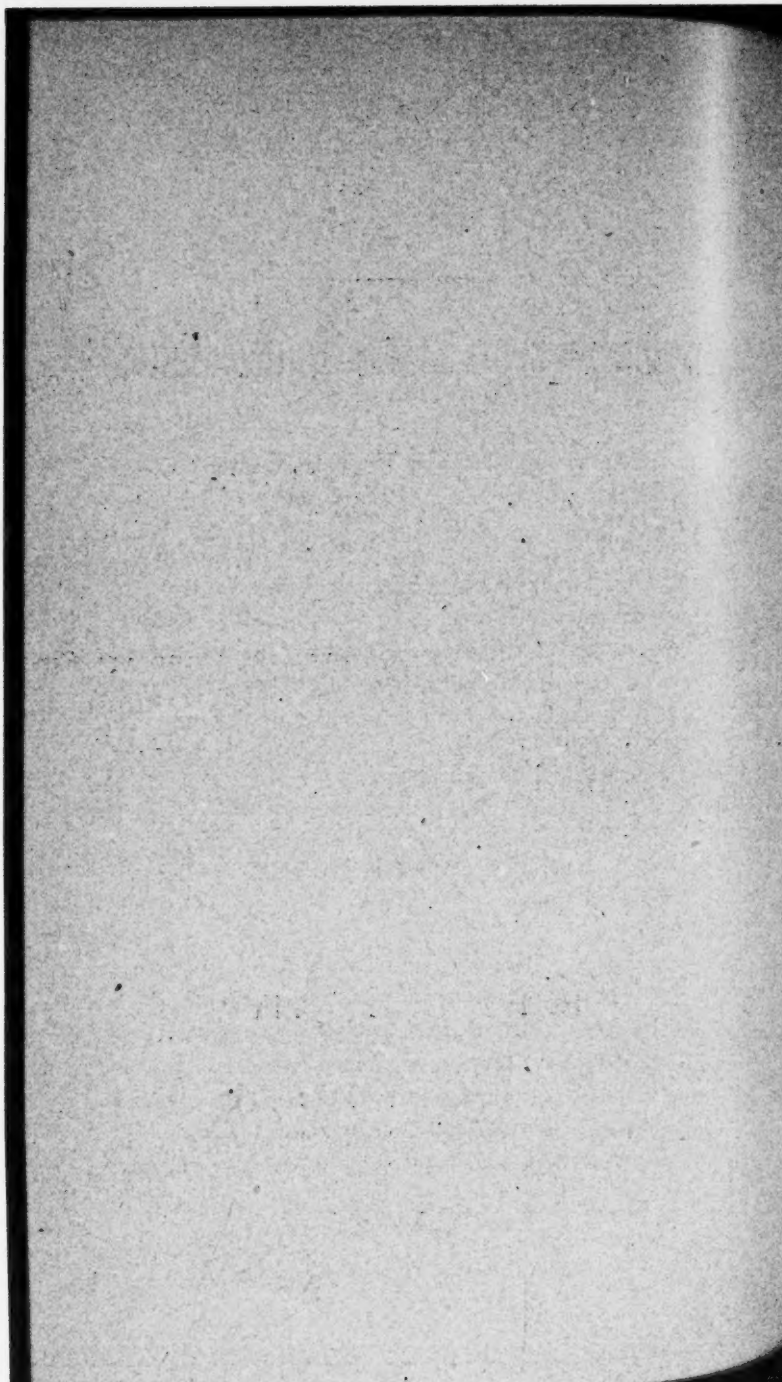
*Ex-parte* MISSOURI, KANSAS & TEXAS TRUST COMPANY,

Petitioner

Petition for Writ of *Certiorari*, requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination, the case of Missouri, Kansas & Texas Trust Company, Appellant, vs. Theodore M. Krumseig and Louise Krumseig, Appellees.

## BRIEF OF PETITIONER.

WM. C. WHITE,
Attorney for Petitioner



# IN THE
# Supreme Court of the United States.

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*Ex-parte* Missouri, Kansas & Texas Trust Company, Petitioners.

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Petition for Writ of *Certiorari*, requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination, the case of Missouri, Kansas & Texas Trust Company, Appellant, vs. Theodore M. Krumseig and Louise Krumseig, Appellees.

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## BRIEF OF PETITIONER.

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### STATEMENT OF CASE.

In this matter, in order to a proper understanding by this court of the question presented by this petition, it is unnecessary to review the case or to detail the evidence. Suffice it to say that petitioner, a Kansas corporation, loaned to Theodore M. Krumseig, a resident of Duluth.

Minnesota, a sum of money, and as collateral to the loan said Krumseig and his wife executed to petitioner a mortgage on real estate in Duluth.

The Krumseigs brought suit in the State Court in Minnesota, on the equity side of the court, to have the loan declared void for usury, and the promissory note given therefor and the mortgage executed as collateral thereto set aside and cancelled. Petitioner, defendant in that suit, removed the suit into United States Circuit Court for the Fifth Division, District of Minnesota, and that court, after a hearing, entered judgment for plaintiffs, the Krumseigs, for the relief demanded. An appeal was had to the United States Circuit Court of Appeals for the Eighth Circuit, and there judgment of the lower court was affirmed, both courts basing their judgment on a finding of usury.

Among other contentions of petitioner, it was maintained that in a court of equity, "He who seeks equity must do equity," and that as a condition precedent to the granting of relief, it was necessary for the Krumseigs to repay or offer to repay to petitioner the amount justly owed to it for principal and lawful interest.

On the authority of a Minnesota decision that under Minnesota law the rule of equity is abrogated as far as Minnesota contracts are concerned, the Circuit Court of Appeals decided, by a divided vote, that the equity rule referred to could

not be invoked in this case. Judge Sanborn dissented, on the ground that "the equity jurisdiction conferred on the Federal Courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the union."

A re-hearing was asked and denied, but in connection with the refusal of the Circuit Court of Appeals to grant a re-hearing, the following letter, the original of which is annexed to a copy of this Brief and presented herewith, was received by counsel for petitioner:

"St. Louis, Missouri, Dec. 14, 1896.

"William C. White, Esq.,

"Duluth, Minn.

"Dear Sir:—

"The court denied your application for "a re-hearing in the Missouri, Kansas & Texas "Trust Co. vs. Krumseig, this morning. With "the approval of my associates upon the bench, "I make the suggestion to you that the question "upon which the members of the court "disagree, is one which ought to be answer-"ed by the Supreme Court of the United States. "It is an important question, one which involves "the jurisdiction of the Circuit Courts in many "equity cases, and we think it very probable that "if you presented this case to the Supreme "Court and asked for a writ of certiorari, that

"court would grant it, and would review the "case.

"Respectfully yours,

"WALTER H. SANBORN."

It is in accordance with the foregoing suggestion, coming from the court itself to whom the writ would be addressed, that your petitioner brings this matter here.

This court is very familiar with the provision of Section six of the Judiciary Act of March 3, 1891, establishing Circuit Courts of Appeals, that in the cases in which the judgments and decrees of the Circuit Courts of Appeals are made final (of which this case is one), "it shall be competent for the Supreme Court to require, by *certiorari*, or otherwise, any such case to be certified to the Supreme Court for its revision and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

26 Stat., 826, C. 517.

This section of the Judiciary Act has been before this court a number of times, and I am aware that in a case argued before this court in March, 1893, where the assistance of this writ was invoked, this court expressed the opinion that the authority conferred upon it by that provision of the section "should be exercised sparingly and with great caution, and only in cases of

peculiar gravity and general importance, or in order to secure uniformity of decision;" and that out of many applications for this writ under this section, two only had up to that time been granted.

American Construction Co. vs. Jacksonville Railway. 148 U. S., 372, 383.

I suspect also that counsel for the Krumseigs, appellees below, will cite the case of Woods, petitioner, where the question was whether the Circuit Court of Appeals should follow the construction by the Supreme Court of Minnesota, of a statute of that State; as similar to the present case and conclusion herein.

But this court refused the writ in that case on the ground that the inquiry therein did not fall "within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." And in another part of the opinion, referring to this section, says: "But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

In re Woods, 143 U. S., 202, 206.

It is "*in the interest of jurisprudence and uniformity of decision*" that we ask for the writ in this case. If the decision of the Circuit Court of Appeals is permitted to stand it will introduce into our jurisprudence a discordant element that is sure to be followed by much vexatious litigation, which would be avoided by the settling once and for all by this court of the application of the rule of equity in all cases of this nature.

It is believed that the highest court of every state of the United States which has a usury law with the exception of New York and Minnesota, has followed this rule; so that Tyler in his work on Usury, says: "The invariable rule in equity is, that a bill or other proceeding in equity to set aside or affect a usurious contract, whether filed for relief or discovery, or for both, cannot be maintained without paying or offering to pay the amount actually loaned."

Tyler on Usury, 435.

The following are a few of the cases in our state courts in which the rule that "he who seeks equity must do equity" has been followed; only one of the leading cases in any state being cited.

Rogers vs. Torbut, 58 Ala., 523, 525.

Ruddell vs. Ambler, 18 Ark., 369. (Under State law.)

Pickett vs Merchants Nat. Bank, 32 Ark., 346, 364. (Under U. S. law.)

Campbell & Jones vs. Murray, 62 Ga., 86, 96.

Cushman vs. Sutphen, 45 Ill., 322.

Connor vs. Myers, 7 Blackf. (Ind.) 337.
Morrison vs. Miller, 46 Iowa, 84, 86.
Jordan vs. Trumbo, 6 Gill & Johns. (Md.) 103, 106.
Eiseman vs. Gallagher, 24 Neb., 79, 82.
Giveans vs. McMurtry, 16 N. J. Eq., 468, 473.
Ballinger vs. Edwards, 4 Ired. Eq. (N. C.) 449, 452.
Shelton vs. Gill, 11 Ohio, 417.
Sporrer vs. Eifler, 1 Heisk. (Tenn.) 633, 636.
McDaniels vs. Barnum, 5 Verm. R. 279, 292.
Rietz vs. Foeste, 30 Wis. 693, 695.

The rule of equity has also been followed by the United States Supreme Court and the various Federal Courts, until the decision in this case.

Tiffany vs. Boatman's Institution, 18 Wall., 375, 385.
In re Hoole, 3 Fed. Rep., 496, 500.
Matthews vs. Warner, 6 Ib., 461, 465-6.
Nounan vs. Peper, 24 Ib., 403, 404.

It is hardly proper at this time and upon this application, to discuss the merits of the decision of the Court of Appeals in this case, or of the decision of the Supreme Court of Minnesota which it follows; such a discussion will be in place upon a later review of the case if the writ prayed for herein is allowed. At present it is sought only to demonstrate that the granting of the petition is in the interest of "uniformity of decision" in the Federal Courts. Yet in this connection it seems incumbent upon me to merely outline the reason for the apparent variance between the decisions of the New York Courts and of all other

courts but Minnesota. And in so doing, I think it will become apparent that the variance is *only* apparent, and that the decisions are in reality uniform, excepting only in the case of Minnesota, and there without reason.

The cases cited *supra* are from states and under laws where certain penalties are exacted for usury not only, but also from others where the entire contract is declared void for usury, as in Minnesota. Revert now to the New York decisions.

Under the laws of New York state as existing prior to the enactment of Chap. 430, Sec. 4, Laws of 1837, the decisions uniformly upheld the rule for which we contend. The leading case prior to that law was the case of Fanning vs. Dunham. The law of New York at that time voided the contract as does the Minnesota law, and there the court held, that when the borrower sets up usury as a defense to an action on the usurious contract the securities will be declared void and ordered to be delivered up and cancelled; but where the borrower files a bill in equity for relief, he must before he is entitled to relief, pay or offer to pay the principal and interest lawfully due.

Fanning vs. Dunham, 5 Johns. Ch., 122, 142-4.

The decision was followed in all the courts of that state until the enactment of the law of 1837, when a new departure was taken, and it was de-

cided that the borrower might come into a court of equity thereafter and seek relief from an nsurious contract, without offering to make any re-payment whatsoever.

Livingston vs. Harris, 11 Wend., 329.
Williams vs. Fitzhugh, 37 N. Y., 444, 448—456.

We need not look far to discover the reason for this change of base in the state of New York, or to discover that the reason exists alone in that state. The court in the case of Williams vs. Fitzhugh, *supra*, discusses the reason fully, and I quote from the opinion of the court on pages 452, 3 and 4.

After stating on page 452 that "it is familiar doctrine in courts of equity that 'he who seeks equity must do equity,' and without that the court of equity will not extend its arm for the relief of the suitor;" and on page 453 that "it cannot be doubted that when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever is equitable that he should do before the court will interfere;" the court asks, "On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition? * * Why should he not do equity? Why should he not pay to the defendants what he in fact received?"

On page 454 these questions are answered in

these words: "*The answer and the only answer* which is or can be suggested, is that our statute declares (Laws of 1887, Chap. 430, § 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the statutes, concerning the interest of money, or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal* on the *sum or thing loaned*, nor shall any court of chancery require or compel the payment or deposit of *the principal sum or interest*, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or this act."

Williams vs. Fitzhugh, *supra*.

Mark the emphatic language of the court, that "*the answer and the only answer* possible, to the question why the equity rule is not applied in that case is, that the statute then in force had expressly provided that it *must not be applied*. Therefore in commenting on the New York change of front, the Supreme Court of Nebraska said that in Nebraska "cases decided under that statute are not applicable."

Eiseman vs. Gallagher, 79, 82.

And the Supreme Court of Wisconsin, where the statutes at the time existing provided that in an action for discovery on a usurious loan, it

should not be necessary to pay or offer to pay interest, nor should the court require the payment or deposit of the principal sum as a condition of granting relief; decided that as the legislature had not extended this provision to cover bills filed for *relief* as well as *discovery*, the New York decisions had no applicability in cases where relief against the usurious contract merely was sought, and applied the rule that "he who seeks equity must do equity."

Rietz vs. Foeste, 30 Wis., 693, 696.

The United States Circuit Court for the District of Massachusetts, went still further, in a case involving this very usury law of the state of New York, and commented upon that law and its application in courts of equity of other states and of the United States as follows: "One who seeks relief in equity on this ground [that an usurious contract is void] must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. * * * * * The statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as understood by the court in which he sues. If then, the defendants held the

notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment.

Matthews vs. Warner, 6 Fed. Rep. 461, 465-6.

It will thus be seen that the position of the courts is consistent; that in New York state itself the only reason for denying the application of the rule of equity is the express abrogation of that rule, in chancery or equity cases; and that even then, it is denied application in the Federal Courts. Now has Minnesota any similar statute to justify it? We look in vain for any such enactment of its legislature or anything at all similar and must find on investigation that Minnesota's Supreme Court presents the only exception in the list of courts which have affirmed this rule of equity, and that that court has refused so to do under a mistaken conception of the scope of its statutes.

Without stating fully the existing usury law of Minnesota (Chap. 66, Laws 1879), it is sufficient to say that Section 1 provides for an interest rate not to exceed ten per cent; Section 2 provides that where more than lawful interest has been paid "the full amount of interest or premium so paid, with costs," may be recovered in an action brought within two years, one-half to be paid to the use of the common schools. Section 3 provides that all usurious contracts shall be void, etc.; Section 4 provides for the filing by a

borrower of a complaint for discovery of any sum, etc., paid in violation of the usury law, and compels answer thereto under oath; Section 5 relates to evidence in usury cases; Section 6 reads, "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void. and enjoin any proceeding thereon, and shall order the same to be cancelled and given up;" Section 7 repeals inconsistent laws and especially Section 1, Chap. 15, Laws of 1879.

General Laws, 1879, Chap. 66.

This covers our usury law as now existing and as existing ever since the contract under consideration was made. The only provision that could be construed or misconstrued as doing away with the equity rule is the above stated section 6; and an inspection thereof shows at a glance that it is only in case of a proceeding on usurious contract to enforce the same, that the courts will enjoin the lender; it does not *attempt* to provide that a court of equity shall not administer equity, if a remedy is sought by the borrower, on that side of the court. It does render the contract void, but that is true in the other states from which we have cited,—Arkansas, Tennessee, Vermont, etc., and see 18 Wall., 375, 385.

That the equity rule is not sought to be abro-

gated by the 1879 law of usury is shown by another fact. The 1879 law is in all essential features the same as the law of 1877, excepting that it reduced the legal rate from 12 per cent as in 1877, to 10 per cent. Section 6 of the Law of 1877 is identical with Section 6 of the Law of 1879.

General Laws 1877, Chap. 15.

Yet with this same law on the statute books of the State of Minnesota, the Legislature of that state in the year 1878 enacted a law, one section of which (Laws of 1878, Chap. 53, Section 24,) reads as follows: "That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or to his assigns." This law remains on the statute books today, unaltered.

Laws 1878, Chap. 53, Sec. 24.

Why enact this section of chapter 53, laws of 1878, if the Supreme Court of Minnesota was correct in its interpretation of the usury laws, in the case of Scott vs. Austin (36 Minn., 460, 465)? If a court of equity would interfere, to give the

borrower a cancellation of his securities because of the contract being void, it would equally have the right to set aside the sale under foreclosure of those securities and cancel them, in an action therefor, and there was no necessity of extending to the mortgagor a less potent remedy than that already his,—a penalty covering triple interest, where he had the right to both interest and principal.

But it will be contended that the Federal courts are in any event bound by the construction put upon a state statute by its highest court. We do not contend that an equity rule may not be abrogated by a legislature, as well as a rule of common law, but we do contend that it has not been in this instance; if then the state court declares that to have been done which in fact has not been, as shown by a perusal of the statute, it is certainly true that a Federal court will not be bound by its decision.

But further than this, it has been universally held by this court that "the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers."

Green's Adm'x vs. Creighton, 23 How., 90, 105.

Clark vs. Bever, 139 U. S., 96, 103.

United States vs. Howland, 4 Wheat, 108, 115.

Robinson vs. Campbell, 3 Wheat., 211, 222.
Payne vs. Hooke, 7 Wall., 425, 430.
Kirby vs. Lake Shore Railroad, 120 U. S., 130, 137.
Arrowsmith vs. Gleason, 129 U. S., 86, 98, 99.

In Payne vs. Hooke, *supra*, the court said, "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

In Kirby vs. Lake Shore Railroad, *supra*, the court said, "Their jurisdiction in equity [that of the Federal Courts] cannot be impaired by the local statutes of the different states in which they sit;" and it adopted the language of Mr. Justice Curtis, "The equity practice of the courts of the United States is the same every where in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws."

In Arrowsmith vs. Gleason, *supra*, the court said, "We have repeatedly held 'that the jurisdiction of the courts of the United States, over controversies between citizens of different states, cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes

modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable," repeating the dictum of the court in the case of Payne vs. Hooke, *supra*. And in United States vs. White, 17 Fed. Rep., 561, 565, the Circuit Court for the District of California declared that "It is a universal rule in equity never to enforce either a penalty or forfeiture."

Under such holdings of the United States Supreme Court, it seems to me that the Circuit Court was right in its ruling in Matthews vs. Warner, *supra*, and that whatever may be the practice or the statute in Minnesota, and whatever its construction by the courts of that state, the statute cannot bind a court of equity outside of the state, or a Circuit Court of the United States sitting in equity in a controversy between citizens of Missouri and Minnesota. It seems to me further, that in the interest of that uniformity of decision, which is broken only in this one instance as shown by an examination of the cases, but which is in danger of being entirely destroyed if the decision of the Circuit Court of Appeals shall be allowed to stand in this case, without review; the writ should be allowed as prayed.

Dated February 15th, 1897.

Respectfully submitted,

WM. C. WHITE,
Attorney for Petitioner.

No. 316.

FILED
FEB 28 1898
JAMES H. McKENNEY
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# Brief and Argument of Appellants.

Brief of White for Appellant

## Supreme Court of the United States

Filed Feb. 28, 1898.

October Term, 1897.

No. 316.

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THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY,

Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE KRUMSEIG,

Appellees.

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WILLIAM C. WHITE,
Attorney for Appellant

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DULUTH.
C. E. RICHARDSON, Printer.
1898.

# Supreme Court of the United States

## OCTOBER TERM, 1897.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY,

Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG,

Appellees.

### STATEMENT.

The facts in this case are as follows: That at Duluth, Minn., on September 5th, 1890, the appellees, Krumseig, executed to the appellant their ten several promissory notes, each for the sum of $360.00, and all payable in monthly installments of $30.00 each, and each of the one hundred and twenty (120) monthly installments drawing ten (10) per cent per annum interest after due: and that to secure the payment of said notes, said respondents executed to appellant a mortgage on certain real estate situated in Duluth, Minnesota. (Transcript of Record, folios 3½–6), that the consideration for the promissory notes and mortgage aforesaid was the sum of $2,000.00 loaned to respondents (Transcript, folios 41, 64), interest upon said sum from the date of the loan until maturity of the promissory notes, and that por-

tion of the mortgage in the following words: "And it is further understood by and between the parties of the first part, their executors, administrators or assigns, and the party of the second part, the Missouri, Kansas & Texas Trust Company, that in case the said Theodore M. Krumseig, one of the said parties of the first part, should die after the execution and delivery of said notes and this mortgage and within ten years thereafter, each and every of said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided however, that the said parties of the first part have promptly paid each monthly installment which shall have become due prior to his death, according to the terms of said notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not, without the written consent of the said party of the second part, visited the Torrid Zone or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train or on a steam or sailing vessel for two years." (Transcript, folio 5.)

The application for the contract in question is found on pages 41–42 of the Transcript, and at folio 48 contains the following provision: "In consideration of the above premises I agree to execute and deliver to the said company 10 promissory notes, each of the sum of $360.00 payable in monthly installments of $30.00, commencing at date of signing contract. The said notes cover principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements.

"The contract hereafter to be entered into, if my application should be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above

notes shall contain a clause guaranteeing, in case of my death before payment of any unpaid installments, a release of unpaid portion of debt, if I shall have promptly paid previous installments and kept other conditions.

"As part of foregoing condition, I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual fee of $3.00 therefor; and to pay all fees for recording deed of trust or mortgage."

The appellee, Theodore M. Krumseig, passed the medical examination conditioned in the application and paid three dollars fee therefor(Transcript, folios 26 and 39); said medical examination was submitted to the Prudential Life Insurance Company of America, of Newark, New Jersey, and upon favorable report said Life Insurance Company contracted with appellant to insure appellant's insurable interest in the life of appellee Theodore M. Krumseig during the life of the contract. See policy and contract (Transcript, pp. 30 and 41.) Appellant was not a Building and Loan Association (Transcript, folios 51–52). Appellant never complied with the laws of Minnesota regarding the transaction of life insurance business in that state by foreign corporations (Transcript, folio 26).

*I call the attention of this court to statements of fact in this case that are nowhere rebutted and are conclusive:*

1. The expert witnesses agree that the "contract of perpetual forbearance" if death occur, which is coupled with the loan contract in this case is *not a life insurance contract.*(Transcript. folios 6-7, 67–68, 98–99, 103–105.

2. With each $1,000.00 of loan the contract gives the borrower the exact equivalent in effect to him, however, of a ten-year, non-participating endowment policy of life insurance, in the sum of $1,000.00; and repayment of loan, interest and indemnity *together cost borrower $180.00 per year.* (Transcript, folios 55, 57, 61, 62, 65, 66, 74, 89–92, 96–98, 103–105.)

3. A similar loan at 10 per cent interest, with equivalent benefits to borrower by endowment life insurance, would *together cost borrower $191.76 and upwards per year.* (Transcript, folios 56–57, 60–61, 65–68, 74, 78–80, 82–84, 89–92, 96–98.)

4. It follows that, allowing endowment rates for the equivalent 'contract of perpetual forbearance," *Krumseig paid less than 8 per cent per annum interest for his loan.* (Transcript, folios 78, 80–81.

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## ASSIGNMENT OF ERRORS.

I maintain that the decision herein was erroneous:

I. Because there was no equity in appellees' case entitling them to relief;

II. Because it is not sustained by the evidence and is contrary thereto;

III. Because it is contrary to law;

IV. Because it should have been rendered instead in favor of appellant, dismissing appellees' complaint.

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## BRIEF OF ARGUMENT.

### I.

Respondents are seeking to obtain what they call equity from the court, in a decree setting aside and annulling their contract with appellant, for the repayment of money borrowed and interest and the price of the indemnity feature of the contract, on the ground that the exactions thereof constitute usury and are unlawful; and yet, in a court of equity, they have made no offer to repay the loan with *lawful* interest.

The maxim is an old one, and of frequent application, "*He who seeks equity, must do equity;*" and the first application of this maxim by text-book writers is to just such cases as the present one is claimed by respondents to

be; cases where a borrower of money upon usurious interest seeks the aid of a court of equity in cancelling the instrument; he can obtain his remedy only upon condition of repaying the sum justly and equitably due to his creditor—the amount actually loaned and legal interest.

1 Story's Eq. Jur. (10 Ed.) §642
Pomeroy's Eq. Jur., §§ 391, 937.

It is believed that the highest court of every state of the United States which has a usury law, with the exception of New York, Arkansas and Minnesota, has followed this rule, so that Tyler in his work on usury, says: "The invariable rule in equity is, that a bill or other proceeding in equity, to set aside or affect a usurious contract, whether filed for the relief or discovery, or for both, cannot be maintained without paying or offering to pay the amount actually loaned."

Tyler on Usury. 435.

The following are a few of the cases in our state courts in which the rule that "He who seeks equity must do equity," has been followed; only one of the leading cases in any state being cited.

Rogers vs. Torbut, 58 Ala., 523, 525.
Ruddell vs. Ambler, 18 Ark., 369. (Under State Law.)
Pickett vs. Merchants' Nat. Bank, 32 Ark., 346, 364. (Under U. S. Law.)
Campbell & Jones vs. Murray, 62 Ga., 86, 96.
Cushman vs. Sutphen, 45 Ill., 322.
Conner vs. Myers, 7 Blackf. (Ind.) 337.
Morrison vs. Miller, 46 Iowa, 84, 86.
Jordan vs. Trumbo, 6 Gill & Johns. (Md.) 103, 106.
Eiseman vs. Gallagher, 24 Neb. 79, 82.
Giveans vs. McMurty, 16 N. J. Eq. 468, 473.
Ballinger vs. Edwards, 4 Ired. Eq. (N. C.) 449, 452.
Pickett vs. Pickett, 2 Hill Eq. (N. Car.) 470, 473-4.
Shelton vs. Gill, 11 Ohio, 417.
Sporrer vs. Eifler, 1 Heisk. (Tenn.) 633, 636.
McDaniels vs. Barnum, 5 Verm. R. 279, 292.
Reitz vs. Foeste, 30 Wis., 693, 695.

The rule of equity has also been followed by the United States Supreme Court and the various Federal Courts, until the decision in this case.

Tiffany vs. Boatman's Institution, 18 Wall., 375, 385.
In re Hoole, 3 Fed. Rep., 496, 500.

Matthews vs. Warner, 6 Ib., 462, 465-6.
Nouman vs. Peper, 24 Ib., 403, 404.

The cases cited supra are from states and under laws where certain penalties are enacted for usury not only, but also from others where the entire contract is declared void for usury, as in Minnesota. Revert now to the New York and Arkansas decisions.

Under the laws of New York state as existing prior to the enactment of Chap. 430, Sec. 4, Laws of 1837, the decisions uniformly upheld the rule for which we contend. The leading case prior to that law was the case of Fanning vs. Dunham. The law of New York at that time voided the contract as does the Minnesota law, and there the court held, that when the borrower sets up usury as a defense to an action on the usurious contract the securities will be declared void and ordered to be delivered up and cancelled; but where the borrower files a bill in equity for relief, he must, before he is entitled to relief, pay or offer to pay the principal and interest lawfully due.

Fanning vs. Dunham, 5 Johnson, Ch., 122, 142-4.

The decision was followed in all the courts of that state until the enactment of the law of 1837, when a new departure was taken, and it was decided that the borrower might come into a court of equity thereafter and seek relief from a usurious contract, without offering to make any re-payment whatsoever.

Livingston vs. Harris, 11 Wend. 329.
Williams vs. Fitzhugh, 37 N. Y., 444, 448-456.

We need not look far to discover the reason for this change of base in the state of New York, or to discover that the reason exists alone in that state. The court in the case of Williams vs. Fitzhugh, supra, discusses the reason fully, and I quote from the opinion of the court on pages 452, 453, 454.

After stating on page 452 that "It is familiar doctrine in courts of equity that 'he who seeks equity must do equity,' and without that the court of equity will not extend its arm for the relief of the suitor"; and on page 453, that "It cannot be doubted that when a party comes into a

court of equity to remove a cloud upon the title to his land, he must do whatever is equitable that he should do before the court will interfere"; the court asks, "On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition? Why should he not do equity? Why should he not pay to the defendant what he in fact received?"

On page 454 these questions are answered in these words: "The answer, and the only answer, which is or can be suggested, is that our statute declares (Laws of 1887, Chap. 430, paragraph 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the statutes, concerning the interest of money, or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the sum or thing loaned, nor shall any court of chancery require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, usurious loans forbidden by the said title or this act."

Williams vs. Fitzhugh, supra.

Mark the emphatic language of the court, that "*the answer, and the only answer possible*, to the question why the equity rule is not applied in that case is, that the statute then in force had expressly provided that it must not be applied. Therefore, in commenting on the New York change of front, the Supreme Court of Nebraska said that in Nebraska 'cases decided under that statute are not applicable.'"

Eiseman vs. Gallagher, 24 Neb., 79, 82.

And the Supreme Court of Wisconsin, where the statutes at the time existing provided that in an action for discovery on a usurious loan, it should not be necessary to pay or offer to pay interest, nor should the court require the payment or deposit of the principal sum as a condition of granting relief; decided that as the legislature had not extended this provision to cover bills filed for relief as well as

discovery, the New York decisions had no applicability in cases where relief against the usurious contract merely was sought, and applied the rule that "He who seeks equity must do equity."

Reitz vs. Foeste, 30 Wis., 693, 696.

The Circuit Court of Appeals in this case (Transcript, folio 129) called attention to the Arkansas statute, but did not take the trouble to call attention to any Arkansas decisions. It will be noted that in the early days in Arkansas, and both under state and United States law, it was decided that the common law rule applied that "He who seeks equity must do equity"; and this was under a law that made the usury contract void. That doctrine was consistently maintained by the Supreme Court of Arkansas down to the years following the enactment of the law of 1887 in that state: See cases cited supra.

Anthony vs. Lawson, 34 Ark., 628.
Grider vs. Driver, 46 Ark., 50, 64.

In 1887, however, the legislature of Arkansas passed a law more sweeping in its provisions than even the law of the state of New York, and which declared in terms that every conveyance or lien given to secure a contract "may be cancelled and annulled at the suit of the maker of such usurious contract or his vendees, assigns or creditors"; and in terms provides, that "neither the maker of the usurious contract nor his vendees, assigns or creditors * * * shall be required to tender or pay any part of the usurious debt or interest as a condition of having such contract and any conveyance, mortgage, pledge or other lien given to secure its payment or executed in furtherance thereof, enjoined cancelled and annulled, and any rule of law, equity or practice to the contrary is abrogated."

Sandall & Hill's Dig. Stats. of Ark., 1894, Chap. 110, Secs. 5086, 5088.

This law is too square-toed to need any interpretation. Commenting upon it, the Supreme Court of the state of Arkansas says: "The legislature thought that the public interest would be advanced by permitting the borrower, though the beneficiary of the illegal contract, to sue for

full relief, untrammeled by any rule of law or equity. That is the purport of the act. It authorizes the borrower to sue for the cancellation (among other things) of any conveyance executed to secure the performance of a usurious contract, and the delivery of possession of any lands held by virtue of the conveyance; and provides that he shall have relief without being required to pay any part of the usurious debt or interest as a condition thereof. It follows that neither his participation in the illegal contract, nor the turpitude of his conduct in appropriating the money of the lender, is any restraint upon his right to relief. The policy of the act rests with the legislature."

Lowe vs. Loomis, 53 Ark., 454, 457.

Aside from the state of Minnesota, this is the only state besides New York whose Supreme Court has decided that the equity rule has been abrogated, and the reason is the same in the state of Arkansas as in the state of New York for so deciding. As emphatically or more emphatically in this case than in that could the court answer the question of equity with the statement that the only possible answer to the question why the equity rule is not applied in Arkansas, is that the statute in force in Arkansas has expressly provided that it must not be applied.

The United States Circuit Court for the district of Massachusetts in a case involving the usury law of the state of New York commented upon that law and its application in the courts of equity of other states and the United States as follows: "One who seeks relief in equity on this ground (that a usurious contract is void) must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. * * * * * * * The statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as

understood by the court in which he sues. If, then, the defendants held the notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment."

Matthews vs. Warner, 6 Fed. Rep., 461, 465-6.

The position of the courts outside of the state of Minnesota, I believe, to be entirely consistent. In New York state as well as in Arkansas the reason for denying the application of the rule of equity is the express abrogation of that rule in equity cases; and even then, the New York rule is denied application in at least some of the Federal Courts, in cases involving the New York law. Has then the state of Minnesota any statute similar to those of New York and Arkansas to justify it in declaring the equity rule abrogated in this state? I look in vain for any such enactment of its legislature, or anything at all similar, and I am unable to escape the conclusion that the Supreme Court of the state of Minnesota, in its former decisions, has entirely mistaken the scope of its own statute.

Without stating fully the existing usury law of Minnesota (Chap. 66, Laws 1879), it is sufficient to say that Section 1 provides for an interest rate not to exceed ten per cent; Section 2 provides that where more than lawful interest has been paid, "the full amount of interest or premium so paid, with costs," may be recovered in an action brought within two years, one-half to be paid to the use of the common schools; Section 3 provides that all usurious contracts shall be void, etc.; Section 4 provides for the filing by a borrower of a complaint for discovery of any sum, etc., paid in violation of the usury law, and compels answer thereto under oath; Section 5 relates to evidence in usury cases; Section 6 reads: "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be cancelled and

given up"; Section 7 repeals inconsistent laws and especially Section 1, chapter 15, Laws of 1879.

General Laws 1879, Chap. 66.

This covers Minnesota's usury law as now existing, and as existing ever since the contract under consideration was made. The only provision that could be construed or misconstrued as doing away with the equity rule is the above stated section 6; and an inspection thereof shows at a glance that it is only in case of a proceeding on usurious contract to enforce the same, that the courts will enjoin the lender; it does not attempt to provide that a court of equity shall not administer equity, if a remedy is sought by the borrower, on that side of the court. It does render the contract void, but that is true in other states from which we have cited earlier—Arkansas, Tennessee, Vermont, etc., and see 18 Wall., 375, 385.

That the equity rule is not sought to be abrogated by the 1879 law of usury is shown by another fact. The 1879 law is in all essential features the same as the law of 1877, excepting that it reduced the legal rate from twelve per cent, as in 1877, to ten per cent. Section 6 of the law of 1877 is identical with Section 6 of the law of 1879.

General Laws, 1877, Chap. 15.

Yet with this same law on the statute books of the state of Minnesota, the legislature of that state in the year 1878 enacted a law, one section of which (Laws of 1878, Chap. 53, Sec. 24) reads as follows: "That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of the foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or to his assigns." This law remains on the statute books today, unaltered.

Laws of 1878, Chap. 53, Sec. 24.

Why enact this section of Chapter 53, Laws of 1878, if the Supreme Court of Minnesota was correct in its inter-

pretation of the usury laws, in the case of Scott vs. Austin (36 Minn., 460, 465)? If a court of equity would interfere, to give the borrower a cancellation of his securities because of the contract being void, it would equally have the right to set aside the sale under foreclosure of those securities and cancel them, in an action therefor, and there was no necessity of extending to the mortgagor a less potent remedy than that already his—a penalty covering triple interest, where he had the right to both interest and principal.

Far be it from me to contend that an equity rule may not be abrogated by a legislature; my sole contention is that it has not been so abrogated in this instance, and that this fact will be shown by a more careful perusal of the statutes of the state in connection with the decisions of other states having similar statutes.

The contention of the court in the opinion on the rehearing of the case of Scott vs. Austin (36 Minn., 460, 465), founded upon the final provision of Section 3 of the usury law, might seem to have some force; but it seems to me that that provision was enacted for a very different reason from that suggested by the court in that opinion. Section 3 provided usurious contracts should be void except as to bona fide purchasers of negotiable paper in good faith for a valvable consideration before maturity, with other provisos, and with the proviso in question that "where the original holder of a usurious note sells the same to an innocent purchaser, the maker of said note shall have the right to recover back from said original holder the amount of principal and interest paid by him on said note."

Now, there is no question but what, under Section 6, if the original payee undertook to enforce the usurious contract by a proceeding in the courts, whenever it satisfactorily appeared to the court that there was a taint of usury the court would, in such proceedings, enjoin the collection and order the contract cancelled; but this would be impossible in case of suit by an innocent purchaser before maturity. The purchaser in such a case could collect with no danger of his proceeding being enjoined, and the maker of

the note would in each instance, by the sale to a bona fide purchaser, have lost the statutory remedy intended to be provided him; consequently the legislature added to the former section a provision to cover that case, and it seems very manifest to me that the final proviso of Section 3 cannot fairly be extended beyond such a case in its application.

If this is not a fair interpretation of that proviso, wherefore the enactment of the second section of that statute, which in terms provides that every person who shall have paid usury may recover as against the recipient of the usurious payment the amount of interest so paid? I do not believe that it was the intention of the legislature that, where a debtor had actually paid money upon his moral obligation, or even in excess of his moral obligation, he could recover back from his payee anything more than the excess payment; and I certainly do not believe in extending the application of laws of this class beyond the necessity imposed by the strictest rules of construction.

But further than this, it has been universally held by this court that "the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly throughout the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers."

Green's Adm'x vs. Creighton, 23 How., 90, 105.
Clark vs. Bever, 139 U. S., 96, 103.
United States vs. Howland, 4 Wheat., 108, 115.
Robinson vs. Campbell, 3 Wheat., 211, 222.
Payne vs. Hooke, 7 Wall., 425, 430.
Kirby vs. Lake Shore Railroad, 120 U. S., 130, 137.
Arrowsmith vs. Gleason, 129 U. S., 86, 98, 99.

In Payne vs. Hooke, supra, the court said: "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

In Kirby vs. Lake Shore Railroad, supra, the court said: "Their jurisdiction in equity (that of the Federal Courts)

cannot be impaired by the local statutes of the different states in which they sit:" and it adopted the language of Mr. Justice Curtis, "The equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws."

In Arrowsmith vs. Gleason, supra, the court said: "We have repeatedly held 'that the jurisdiction of the courts of the United States, over controversies between citizens of different states, cannot be impared by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable," repeating the dictum of the court in the case of Payne vs. Hooke, supra. And in United States vs. White, 17 Fed. Rep., 561, 565, the Circuit Court for the District of California declared that "It is a universal rule in equity never to enforce either a penalty or forfeiture."

Under such holdings of the United States Supreme Court, it seems to me that the Circuit Court was right in its ruling in Mathews vs Warner, supra, and that whatever may be the practice or the statute in Minnesota, and whatever its construction by the courts of that state, the statute cannot bind a court of equity outside of the state, or a Circuit Court of the United States sitting in equity in a controversy between citizens of Missouri and Minnesota. It seems to me further, that in the interest of that uniformity of decision, which is broken only in this one instance as shown by an examination of the cases, the United States Circuit Court of appeals should be reversed in this case and the equity rule upheld.

II.

The remaining assignments of error may be considered together; for the question whether or not the evidence sup-

ports the findings and decision of the trial court, and whether the decision is within the law (the rules of equity aside) depends upon the answer to the further question, whether the evidence supports a finding of usury, or of unauthorized life insurance.

Thus far I have discussed the question of the right of appellees to be heard at all in this matter without first offering to pay back that which they had received. I am most anxious however that the entire question of the rights of the parties, regardless of the question of equity, be reviewed in this court; and this I ask in the interest of all the parties and for the purpose of avoiding further vexatious litigation. Thus far there have been decided in the state and Federal Courts three cases involving a similar contract to this, and in which the Missouri, Kansas & Texas Trust Company, this appellant, was one of the parties, and several others are pending.

M., K. & T. T. Co. vs. McLachlan, 59 Minn., 468.
Krumseig vs. M., K. & T. T. Co., 71 Fed. Rep., 350.
Same vs. Same, 77 Fed. Rep., 32.
Mathews vs. Same, 72 N. W. Rep., 121.

In the McLachlan case, supra, the court probably decided correctly upon the facts as presented; in the Krumseig case in both courts, and in the Mathews case in the state court, the decisions were erroneous, for the reason that they followed the McLachlan case as a precedent, basing their conclusion upon the conclusion of the state court in the McLachlan case, for the reason that the contracts are similar; and as I believe, without a sufficient consideration of the difference between the evidence in all the other cases and that in the McLachlan case; for the contract can only be properly interpreted in the light of the evidence adduced.

In the McLachlan case, we were unfortunate enough to have acted on insufficient information, and consequently facts were stipulated that lead the court to an erroneous conclusion.

This was through no fault of the court, and probably through no fault of counsel, but resulted from a misunder-

standing of the nature of the contract.

This misunderstanding has been corrected in this case, and on the facts as now presented we are entitled to a new construction of the contract. In the McLachlan case we stipulated as a part of the facts that the ordinary cost of carrying life insurance for the amount and for the time represented by the contract in question at the age of the defendant in that case was $852.91 for a ten year contract, whereas it appeared that the charge that was made in excess of the ten per cent allowed for interest in that case was $2,663, and the court concluded that a discrepancy of $1,810.09 between the ordinary cost of straight life insurance and the amount charged by the defendant for its contract of perpetual forbearance in case of death was an excessive charge of that amount, and made as a cloak for usury. We contend, however, that the comparison with straight life insurance is founded upon error, the fact being that the contract for perpetual forbearance in each of these cases is the *equivalent, not of straight life insurance, but of endowment life insurance*. This I will show to the court later in our argument beyond a peradventure, but before doing so I desire to discuss for a moment the law of the case as it seems to me that it should be applied in *any* event.

In order to constitute a contract usurious, four elements must enter in: First, there must be a loan of money; Second, an agreement between the parties that the money shall be repaid at all events; Third, the payment or agreement to pay for the forbearance of the money loaned a greater rate of interest than is allowed by law; and fourth, the intent to take more than the lawful rate of interest.

Tyler on Usury, pp. 92, 96-101, 180-181, 367.

The rule somewhat inaccurately stated by Mr. Tyler on page 96 as to the second constituent of such a contract is more accurately stated on page 367, where it is affirmed upon the authorities considered, "that in order to constitute usury there must be, in the second place, a contract or understanding the money loaned shall be returned

at all events, without substantial contingency or hazard. For, if the return of the principal with interest, or of the principal only, depend upon a contingency, there can be no usury; because that which may never be received cannot be said to be forborne for any given time."

Spain vs. Hamilton, 1 Wall., 604.
Tyler on Usury, page 367.
Truby vs. Mosgrove, 118 Pa. St., 89.

In the last cited case an agreement to pay an unlawful rate of interest upon a debt which by its terms was payable at such a time only as the price of petroleum shall reach $1.15 per barrel was held to depend upon a contingency as to the payment of the principal and to be a good note; although it appeared that between the time of the agreement and the time of bringing suit the market price of the oil exceeded $1.15 and it was not shown that that price was unprecedented or even unusual.

We believe that no case can be found in the books which does not clearly stipulate that the second essential, as hereinbefore quoted, must exist in order to constitute usury in the transaction; yet what can be clearer than that in the event of the death of plaintiff's husband the money loaned was not to be repaid; it was not an agreement for the return of the money at all events. I shall have a little more to say on this subject in connection with the proof of what was actually contracted for.

Again it is said by the court, "It is not enough that the borrower intended to make a usurious agreement, but the intention to take usury must have been in the full contemplation of the parties, not of one party, but of both, to the transaction. There must be an *aggregatio mentium*"

Tyler on Usury, 103.
Condit vs. Baldwin, 21 N. Y., 219.
Lloyd vs. Scott, 4 Pet., 205.

And Tyler goes on to say, "Although more than the legal rate of interest may in fact be reserved or taken, if it appears from all the circumstances of the case that it was not the contemplation of the parties to reserve or take usurious interest the transaction will not be tainted with

usury. There must be an intent to take usurious interest, or, in the language of the law, a corrupt agreement to take it, and therefore the *quo animo* is an essential in all these cases of alleged usury." If it be intended to extend the rule and exclude this *quo animo* as far as the borrower is concerned at least, it must appear as far as the lender is concerned, and a reference to the deposition of the President of the Appellant, Mr. Stillwell, will show just how this contract originated and the intent in originating the same, and that there was no corrupt intent to charge usury in his mind, or in the mind of the company, in making the contract, even had there been an excess of the legal rate charged. (Transcript, p. 77, folios 90-92).

In that event the most that could be claimed by counsel was that there was here an unequal contract entered into, but there is no claim whatever that there was deception or fraud practiced by the defendant. The parties had the right to contract for a legal rate of interest and in connection therewith to make a legal contract for the cost of the accompanying guarantee, and unless such a contract can be shown to be tainted with fraud, it seems to me that it cannot be attacked on the ground of usury under the rules aforesaid; unless, that is, there is evidence of such gross inadequacy of consideration as would itself prove fraud. Mere inadequacy might be a link in a chain, but it would not make the chain unless other links were added.

Battles vs. Loudenslager, 84 Pa. St., 446, 451.
Osgood vs. Franklin, 2 John Ch. Rep., 123.
Christian vs. Fink, 15 Ohio, 600.
LaVasser vs. Washburn, 50 Wis., 201.
Fike vs. Vigers, 2 Drury & Walsh, 267.

In the last cited case the court says that the safe course must be for it not to venture upon acting, and referring to the transaction in that case uses this language: "I feel that this is a very extraordinary transaction; that it creates in my mind strong suspicion that it would be very desirable to have some explanation of it. But, as I have already stated, suspicion is not a ground upon which I can on my own unassisted judgment venture to proceed to set aside the

solemn act of the parties. * * * I am obliged to say that I cannot let my suspicions or my inability to explain this transaction * * * call my conscience into activity for the redress of any fraud which I may be led to suspect."

But we have something better here than a negative case for the appellant, and we have not to rely upon mere failure of proof on the part of appellees. We have a contract here that is so clearly within our right and free from any taint of usury, that it will require but a brief reference to uncontradicted testimony and a brief computation, to establish our claim.

Counsel says that all of our evidence proffered in this case as to "endowment" and comparisons of "endowment" policies, and as to what different people have thought or said of this particular contract are clearly irrelevant, immaterial and incompetent, and that his objections thereto should be sustained, because the contract lies spread before the court, and the court cannot fail to find that it entirely lacks any "endowment" feature. Possibly the court knows all about endowment policies and term life insurance, etc., but I have never heard that these were items of general knowledge that a court would take judicial cognizance of; counsel maintains that we have in one feature of the contract the equivalent in effect of a ten year non-participating life policy; and, on the other hand, I contend that we have the equivalent of a ten-year non-participating endowment policy, in result, to the borrower; how is the court to decide which of our contentions is correct, or whether either is, until it shall have had proved to it just what are these kinds of insurance and in what respects (if any) they are like the guaranty contract in the case at bar? Here was our exact trouble in the McLachlan case; we stipulated as a fact that the cost of ordinary life insurance was thus much, taking it for granted that we had in our contract the equivalent of ordinary life insurance; the court had nothing to do but to make its figures based upon this admission, and finding the cost of ordinary life insurance less than $100, for ten

years on $1,000, while we had charged nearly $100 per year for a $1,000 policy, it concluded that so great a discrepancy was it itself indicative of fraud and a cloak to cover usury.

On the trial of that case the counsel for McLachlan had no occasion to prove the similarity between ordinary insurance and the guaranty feature of our contract, because this similarity was admitted; in the present case, however, he *must prove* that similarity, if it does exist, for the reason that we deny it, and undertake to show this court that the guaranty feature of our contract is exactly the equivalent to the borrower of the endowment insurance provided by regular companies, on the ten year non-participating plan. How on earth any court could decide between us without proof, first, of the nature of the two kinds of insurance, and second, of their result to the borrower, and the comparison thereof with the working and practical results to him of the guaranty feature of our contract, I fail to see; and every particle of evidence that tends to make this clear is decidedly relevant, material and competent.

Counsel says the nature of the contract is the precise question for the court, and that therefore under the rules of evidence there is no room for expert testimony on the very question. Well, look at the evidence and see. Whenever the question, "What is the nature of this contract?" has been asked, it was asked of an insurance expert, and clearly meant,—What is the nature of this contract as interpreted in insurance parlance, and as a basis for comparison with insurance contracts? And every answer given showed the expert's understanding of the question, and was entirely competent; and it will be noted that not one man among them but denied that it had any similarity to ordinary life insurance, and affirmed that it was the exact counterpart in its results, of ten year non-participating endowment insurance. So deposed Mr. Hemperley, Mr. Lunger, Mr. Taylor, all actuaries of prominent eastern companies; so deposed Mr. Stillwell and Mr. Cone, the officers of the defendant and both old insurance men; so also deposed our own home experts, respondents' own witnesses, Mr. Squier and Mr.

Covey, when recalled by me; and so deposed Mr. Mosher, an old insurance man, who acted for the company in making this contract with the respondents; and he added to his statement that the contracts were identical in effect, "I made use of the statement at the time of making loans, that it was in fact the giving of the avails of a policy immediately on the contract being closed, instead of at the end of the ten years period." Transcript, folio 66. So that this was the exact representation made to the borrower when he took the loan, and he must have taken it with that definite understanding.

Either, then, the company misrepresented to him through Mr. Mosher, or they told the truth; if they told the truth, then respondents got just what they bargained for, and the only question left is whether they paid for it an unconscionable amount, from which the court would be at liberty to infer the intent to charge usury.

I do not propose in this connection to review the testimony on this subject, which is voluminous. Mr. Stilwell has told the court very tersely how he conceived this contract, and his exact intent in drawing it, and this evidence was to me very interesting as clearly establishing the direct connection between the contract and the endowment insurance plan.

See Mr. Stilwell's deposition, Transcript, p. 77, folios 90-92.

But Mr. Stilwell and other experts have not only shown the original intent of the designers of the contract; they have also given us the figures from which we may verify their statements; and if the court should see fit to reject every other syllable of their united testimony, the demonstration is so clear that "he who runs may read," and I propose simply to epitomize the results as shown by the figures both of our own experts and those of Mr. Richards; and if these figures do not prove my contention on this branch of the case to a hair, I will submit to defeat without a murmur.

By the results as thus epitomized and tabulated is proved the entire falsity of Mr. Richards' calculation, as submitted to the trial court, and they show beyond the

chance for successful reply, that we have in our contract the exact equivalent in effect and results to the borrower, of the ten year non-participating endowment policy of insurance; that we have these results at a considerably lower figure than they could have been purchased from any insurance company; that the results are free from any contingency whatever and therefore surer than insurance; that in case of the borrower living out the ten years of his contract, it costs him considerably less than would the policy of insurance that counsel contends for; and incidentally that there is therefore no usury here.

In making this comparison, I use for convenience as an example an insurance policy and loan of $1,000 as compared with contract for $1,000 on the part of appellant and appellees; I take the age of 28 as that of the borrower and the legal rate of interest, 10 per cent. For the insurance contracts compared, I use the endowment rate of the Equitable Life Insurance Society, because it is the lowest rate of any testified to and the cheapest insurance on that plan that we can find; and I use the ordinary life figures given me by the testimony of appellees themselves, as probably correct. Following the evidence of the experts, Squier, Covey and Mosher, I shall also compare our contract and its results; first with a loan contract from the Equitable Life to a borrower, coupled with a ten year non-participating endowment insurance policy issued him by the same company; second, with a loan contract between borrower and any other company; third, with a loan made borrower by any individual or corporation and a ten year non-participating life insurance policy. I am quite willing to abide by the results of these figues, all of which must be conceded to be correct, and have been so conceded by both counsel. (See table opposite.)

From the foregoing tables it appears that there is no practical difference in results to the borrower, between the contract of appellant and the contracts for loan with endowment insurance on the plan suggested, excepting the less risk in one case under the appellant's contract, and the more

favorable terms to the borrower in both cases. In the case of appellant, $887.40 of borrower's money was used to pay interest, and the remaining $912.60 went into the company's reserve, and has paid up the principal debt in installments; in case of the Equitable Life, it took $1,000 to pay interest, and the remaining $912.60 went into the company's reserve, to be used at the end of the term in paying up the principal debt. The company did not in this case, however, any more than in the former, pay the principal with its own money; it simply went through the fiction of paying the principal from its endowment fund; in reality the original loan came from its reserve, and the annual payments by the borrower went back into the same reserve, actually repaying the debt in installments as in the appellant's case. The situation is a little different where contracts are made with two companies; but even there the borrower has paid the insurance company in installments, with which to repay him at the end of the term; but in that case he runs a good risk of never getting it back again, which is not true of the others.

As to the fourth method in the comparison, which is that insisted on by respondent's counsel; if for the sake of the argument it were admitted that he could accomplish as good results by that method as by any of the others, does it follow that we must be the losers because we did not follow the best method? It is certainly not the policy of the law to protect a man against foolishly bargaining for more expensive goods than he needs, if he did not get cheated on that which he did buy. And surely if he did actually buy the equivalent of endowment insurance in this case at the same figure he could have gotten such insurance for elsewhere, and saved money on his interest, there has been no very crying fraud to redress. But one thing alone shows the difference between a straight life policy for ten years and what the borrower gets from the appellant under its contract, and that is that under the straight life insurance contract the borrower has got to die to realize; a thing that most people, especially of the age of respondent, object to doing; if he lives out the full term, he has paid, at the best

figures in evidence, $367.60 more for such a loan and insurance than he pays the appellant under its contract, under the same conditions. It is obvious, then, that the straight life contract is in no sense the equivalent of what defendant has given.

It is puerile for counsel to argue that the appellant for each $1,000 of insurance "reinsured" the borrower for about $68.47; charging him greatly more than that, and thereby defrauding him and reaping an unjust benefit. In the first place, appellant's contract with the Prudential Insurance Company of America has absolutely nothing to do with the case; the appellee has no privity of contract with that company, and the two contracts are entirely independent of each other; it is none of the appellee's business, even, whether appellant insured its insurable interest in his life or not. In the second place, the contract appellant got for itself from the Prudential was a different contract from appellee's, and one that would not have been of the same use to him, and moreover was one that appellee could not have obtained for himself in any event, as is shown by the uncontradicted testimony of several witnesses. (Transcript, folios 34, 75, 93.) In the third place, the testimony of appellant shows that in order to obtain this contract with the Prudential, it had to agree to give that company much insurance, to do all the soliciting for such insurance, to collect all the premiums, to run all the risks of collection (paying these premiums itself whether paid by the insured or not) and pay over thus to the Prudential $68.47 per $1,000 of insurance annually, less a small commission, and then run the risk of final collection from the Prudential. It was as though the Prudential Company offered to carry the desired insurance at a very small sum, provided it were not required to hire a single salaried or commissioned officer from start to finish, and had all collections assured to it by valid guaranty.

But in the fourth place, the Prudential Company did not agree to indemnify appellant. If appellee died at the end of the 5th year appellant must in any event pay full

$1,000 to appellee, whereas it would then receive from the Prudential Company less than $500. The last year, on appellee's death, appellant would have repaid him $1,000, and would receive from the Prudential but $70. And this is what counsel wishes to substitute for appellee's contract. The statement of the proposition is sufficient; it is a *reductio ad absurdum*.

Why if appellees had taken a loan at 10 per cent and then themselves contracted (if they could get it) for a reducing policy of insurance, like the Prudential's, and then died in five years, they would have had to pay out on each $1,000, for five years, $500 interest, $49.26 (at Prudential's contract with appellant) for insurance, and would have the principal to pay back, making a total of $1,549.26; thereupon the beneficiary under this reducing policy would be entitled to receive from the insurance company $562.00, and the entire cost to appellees for five years, above receipts under the policy, would be $987.26; whereas the cost under the contract that appellees made with appellant was $900 in five years. No juggling with figures will make any different result than the above, even using the figures of Prudential contract, as counsel desires. Surely counsel cannot be so simple as to think that under this reducing contract of insurance, straight life, the insurance company would pay more than the policy called for, or that it would or could be reducing the amount of his loan in any sum whatever. The loan would remain $1,000 and have to be repaid in full. Similarly, at the end of the ninth year, if appellees could have enjoyed the benefit of the Prudential's contract, reducing at the same rates, they would still owe $1,000, would have paid out at 10 per cent $900 interest and for insurance $69.82, and in case of death the beneficiary would receive $70, leaving as a result $1,899.82 expenditure above receipts, as against $1,620 under our contract. Of course in these figures, I have not considered the original $1,000 which would reduce results just $1,000 under either contract, making nine years cost under ours $620, and under joint one with Prudential reducing straight life policy, $899.82. And

if there were no death, the joint contract with reducing policy at Prudential figures with appellant would cost appellees in 10 years, $1,070.82, as against $800 under our contract. Thus do counsel's own figures disprove his position, taking them at their worst for us; for it is entirely manifest, on a moment's thought, that if appellees borrow money and take out insurance on this reducing plan, their loan remains the same through the years, while their policy reduces.

How, under such a contract or contracts, could the *principal* be reducing? Counsel says the total cost of the Prudential policy ought to govern, and that is $70. Well, if that is true, then also appellant ought not to have more than 10 per cent interest on the loan, or $1,000 total for interest; it would have no receipts from anywhere outside of the foregoing, and the total roceipts to it would thus be in the ten years, $1,070 on each $1,000 loaned. Now if the principal should be reduced each year in the amounts agreed on, it will be paid up in ten years, and we have the astounding result that appellees have paid us straight interest according to law, and for $70 have carried a policy of insurance on the reducing plan and paid up $1,000 of principal. A pretty good result for an expenditure of $70, is it not? Yet this is the point to which appellees' counsel would bring us by his argument. However you put it, it brings us to the same *reductio ad absurdum.* And in the foregoing analysis of appellees' position, is an added demonstration of the fact that the contract we made with the appellees was far different from that we made with the Prudential. Under the contract with appellees for the sum paid us, we must return them full $1,000 in any event, whether death ensued or did not ensue; under the contract with the Prudential, that company must pay us a sum never equal to $1,000 in case of death, and nothing in case of survival.

There seems to be but one other thing to note in this connection in answer to counsel. The foregoing calculations have been made upon the hypothesis that both parties live up to the contract; but counsel has asked, "Suppose borrower default?" Well, suppose he does; is it the duty

of the court to inquire into the consequences of a default in a contract that is entirely legal and proper if lived up to? Certainly not unless in such event some palpable fraud is about to be attempted, and even then, not until the attempt is actually threatened. But let us see.

It does appear that if borrower defaults after first payment to appellant, appellant can sue him and collect $1,620, while under the other contracts he could be sued for only $1,100; but follow this inquiry a little further. If borrower defaulted after the second payment, he would then owe appellant but $1,440; after the third, $1,200; after the fourth, $1,080; and so on in a decreasing ratio of indebtedness, until after the ninth payment he owes but $180; not so with the other companies and contracts; under any of these, if he defaults in any payment, from first to last, he will owe and can be sued for $1,100 with no offset, his non-participating policy being forfeited in case of default; so that it appears that here too the borrower gets the best terms from appellant; the average advantage to him in case of default is actually greater by considerable than under the other contracts, and the court could almost take judicial cognizance of the fact that on all loans it is the first payments that are made promptly, while the later ones are those that are apt to be defaulted.

I find then, that in any light in which this question can be put, we have given the borrower the equivalent of a loan with an endowment policy of insurance and no attendant risk to borrower, for the same terms that he could procure elsewhere, and have charged him less than the legal rate of interest for his money, 8 per cent.

At the first hearing of this case, there were asked several questions which I desire to answer carefully, as to the law of the case. I have compared our contract with contracts in the Equitable and other companies; and the court asked the question, "Conceding that I have here a contract which gives equivalent values, is it legal? Would the Equitable contracts be legal if they were combined in one? Would they be legal (whether combined or not) if in addi-

tion to the legal interest charged, I had exacted the taking of insurance as a condition of the taking of the loan?"

Suppose that I should make a loan of $1,000 at six per cent interest, $60 per annum, and exact as a condition additional to this, that the borrower buy of me a horse for $40. There would certainly be no possibility in that case of predicating usury upon the joint deal, for the interest paid, plus the price of the horse, makes but ten per cent of $1.000, and ten per cent is allowed even for interest; we can say, therefore, off-hand, that the mere coupling of the two contracts (the one for a loan and the other for a sale of anything else) will not constitute the contract entered into illegal on the ground of usury or on any other ground.

But counsel for appellees cited a case from the Circuit Court of the District of Nebraska, which he says decides that the intermingling of a loan contract and an insurance contract will be regarded as an attempt to evade the usury laws by exaction of something besides interest, and which counsel says is conclusive against us.

Missouri Valley I. Co. vs. Kittle, 2 Fed. Rep., 113 (1 McCrary, 234).

Let us see about this. In that case, the plaintiff made a loan at the highest legal rate, 12 per cent, to a party that did not desire or apply for life insurance, and in addition to the exaction of 12 per cent interest, compelled the borrower to take with it an insurance policy on his life, as a condition precedent to and additional consideration for the loan made.

The court holds that it is to be supposed the company made a profit on its life insurance contract, and as the highest legal rate had been otherwise contracted for and reserved, the agreement for this additional compensation for the loan was usurious; it was highest legal rate and something more.

That is a very different proposition from the one in the case at bar, or from that suggested by the court's questions. In our case, we have shown that the lowest insurance procurable in the United States under contract equivalent to ours in results to the borrower would cost $91.26 per $1,000 per annum; and for equivalent (and in many cases better) results, we are entitled to charge the same rate. That

leaves the contract price paid, only $88.74 per annum for interest on $1,000, or about 8.9 per cent, whereas the highest legal rate was 10 per cent in this state; and in the case at bar it appears from the only evidence on the subject (that of Messrs. Stilwell and Cone) that there was actually loss on this business (Transcript, folios 94, 100), and it certainly does not appear that there was a gain of any kind that would make the amount of net gain on the whole transaction run up to 10 per cent per annum, if we were to take the Nebraska case as law and carry its conclusions to the utmost possible limit. This case does not come within the rule laid down in 2 Fed. Rep. 113.

We have fortunately several other cases on this question, and the very first one is a case from the District of Iowa, reported in the 2d of McCrary, and in which the opinion is written by the same judge who wrote the opinion in the foregoing Nebraska case (Judge McCrary). It shows clearly the ground of his opinion in the two cases to be just what I have stated, and establishes the rule to be, that where, as a condition of making a loan, the borrower is required to take a life insurance policy from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, the profit thus derived is equivalent to additional interest, and therefore usurious. It is doubtful if all courts would go to this extent, but it is certain that they will not and cannot go further.

Nat'l Life I. Co. vs. Harvey, 2 McCrary (U. S. Circuit), 576.
See also Miller vs. Life Ins. Co. of Virginia, 24 S. E. Rep., 484.
Utica Ins. Co. vs. Cadwell, 3 Wend., 296, 301.
Washington Life I. Co. vs. Paterson Silk M. Co., 25 N. J Eq., 160.
Homeopathic M. Life I. Co. vs. Crane, 25 N. J. Eq., 418.

The foregoing cases are all illustrative of our contention and of the rule invoked, though the courts do not in some of them go even as far as in the cases decided by Judge McCrary; the New York and New Jersey cases holding that conditions of this character are not *per se* usurious in event even of the highest legal rate being charged but depend upon the real intention of the parties.

In the case in 3 Wend., 296, the borrower was required

to make a note with sureties (which it seems drew the highest legal rate, 7 per cent) and to effect an insurance on a dwelling house. The court held that this was not a usurious contract; as the insurance "was made at the usual rates of premiums, there could be no shift or contrivance in this transaction whereby the defendants were made to pay more than seven per cent interest on the loan made."

Utica Life Ins. Co. vs. Cadwell, 3 Wend., 296, 301.

Think of it; I suppose every loan made nowadays upon property in our large cities on which there are buildings whose burning would materially lessen the security, even where made at the highest legal rate, is made upon condition that policies of insurance be given the loaner as additional collateral. Many of these loans are made by our large insurance companies, and the collateral fire insurance is taken out by themselves in their own company. Would it be held that the fact of their making a profit on their insurance policy in addition to the highest legal rate on the loan, constituted the double contract usurious? Counsel will say that this is life insurance in the case at bar; but I fail to see where that makes a difference in the principle involved.

But take the New Jersey cases then, where (in both cases) life insurance policies were exacted as one condition of the loan, policies to be taken from the company making the loan. In the first case, the loan was made at highest legal rate, 7 per cent, and the evidence did not show conclusively whether the taking of the policy of insurance on his life was a condition precedent or not; but the court says, "If it be admitted that it was a condition of the loan, it is not evidence of a usurious agreement. The policy was taken out at the usual rate, and there is no evidence whatever, that it was designed as a cover for unlawful interest."

Washington Life, vs. Paterson Silk M. Co., 25 N. J. Eq. 160.

In the last cited case, 25 N. J. Eq., 418, a loan was made to John R. Crane, at legal interest to the limit of 7 per cent, upon condition that his son take out a policy of *endowment insurance* for five years of $8,800, and pay a prem-

ium therefor of $2,009.38 per annum payable half yearly, that being about the yearly premium for endowment insurance usually charged by insuramce companies. The court said, "In the present case, the taking out of the policy was made a condition to the procurement of the loan. The circumstance is not denied by the complainants, but whatever criticism it may expose their business methods to, it can hardly be contended, by itself, to make the bargain a usurious one. * * * I am satisfied upon a careful consideration of the evidence in this case, that usury is not proved by it. Where a policy is issued in good faith, at the fair and customary rates, as part of a general operation, wherein a loan to the policy holder is the other part, I see no reason to question the legality of the loan, even though it depends on the taking out of the policy. It is a question of *bona fides*, and must be so dealt with. The expediency of it as a business transaction is one thing; the legality of it is another."

Homeopathic Mut. Life I. Co vs. Crane, 25 N. J. Eq., 418.

I contend that this rule of bona fides in such cases as this is the proper rule, for the reason that the actual intent of the parties is alwaays laid down in the books as one of the essential elements in the proof of usury; but whether the court holds this the true rule, or that the rule as laid down by Judge McCrary is the correct one, the present case comes within the rule in either event.

I contend further, that the results of our contract to the borrower are at every point and at all times the same as would be a contract of endowment insurance, and that if we have sold what is as good for him as endowment insurance, we are entitled to charge him therefor at least as much as would be charged for endowment insurance; which being the case, a fair charge to him under that part of our contract was $91.26 per annum for each $1,000 of his loan.

I contend further, that this result being reached, there remains but $88.74 per annum of the consideration, and this is but 8.9 per cent per annum for the loan, and is within the legal rate by more than 1 per cent; that there has been

shown no fraud or bad faith on the part of appellant, and no intent to charge beyond 8. per cent, but that the contrary intent has been shown by the evidence of Mr. Stowell and by all the evidence as to values; and further, and leaving out of question the good faith of the parties, we do not anyway come within the rule that forbids us to exact any other condition of loaning where we have exacted the highest legal rate of interest (if that rule be followed), for we have not done so, and there is here no usury.

III.

This contract is *not an insurance contract*. Counsel for appellees maintained in the trial court that the contract in the case at bar is not *Endowment Insurance*, because the distinguishing feature of that class of insurance consists in the fact that thereunder "at the end of a fixed period of time the insurer will pay the amount of the policy to the insured, who is alive." This is exactly our own contention in the case; it is not endowment insurance for that very reason; there is no agreement to pay back to the plaintiff one cent at the end of a term of years, or at any time; there is no endowment fund heaped up for repaying principal, and therefore there is no endowment insurance; there is simply the *equivalent* of endowment insurance as far as the borrower is concerned, for the reason that the fund is not accumulated with which to repay him his money, but he is paid his money in advance and thereafter does the paying back to the company. It is, as Mr. Taylor has well said in his deposition, "the reverse of endowment insurance," and not endowment insurance. In response to this, counsel said that "things equal to the same thing are equal to each other." True, but it does not follow that things are the same because their effects are the same; otherwise we might on occasion have counsel arguing that an injection and a cathartic are the same.

But let us follow counsel's reasoning a little farther. If this is not endowment insurance, "by the same token" and following the argument to its logical conclusion, it is

not *insurance;* because here the company does not agree at any time to pay plaintiff anything, having paid him everything in advance, while in insurance contracts the distinguishing feature consists in the fact that at a fixed time (so many days after the death of the assured) the company will pay the amount of the policy to his legal representatives. If then, the contract is not endowment insurance, by an exact parity of reasoning, neither is it insurance. Counsel cannot escape the result of his own deductions.

Endowment insurance contemplates the payment at a fixed time to the insured of the face of his policy; the contract in question does not; it is therefore not endowment insurance: straight life insurance contemplates the payment at a fixed time to the beneficiary, of the face of the policy; the contract in question does not; it is therefore not straight life insurance.

Thus much being definitely settled, then, we are entitled to the enquiry, "What is the contract in question?" The District Court for St. Louis County, Minnesota, answered that query in the opinion of the court in the case tried heretofore, of McLachlan vs. this same defendant, involving the merits of a similar contract, and I quote the words of that court, which are admirably chosen to convey the exact definition of the contract: "It is just what its terms indicate, an agreement for perpetual forbearance on the part of the plaintiff if the death occur." And in this connection and as illustrating my contention that there is no life insurance feature in the contract in question, I cannot do better than adopt the language of Robert B. Cone, the Secretary of the Defendant company, in his answer to the question of counsel why this is not life insurance. This is found in a deposition taken in this case at Kansas City, in which Mr. Cone says (Transcript, p. 84, folio 98):

"I don't know what definition a lawyer would give to life insurance, but in the ordinary acceptance of the words, they mean a contract whereby the insurer promises to pay out a certain sum of money upon the death of a person, and Webster so defines it. Under the contract the defendant

does not promise to pay anything upon the death of a person. It delivered to the plaintiff at the beginning all of the money it agreed to deliver to him in any event. It merely promises not to ask a repayment of it in case he dies before he has paid it. It is true that a contract of life insurance and this contract both include a chance of death, but the one is a promise to *pay something* in the event of his death, and the other is a promise to *do nothing* in case of death, but merely an agreement that his death will satisfy the debt. In the case of life insurance the insurance company has in its hands all of the money, and the insured takes all of the risk of losing the premium paid, and the risk of being unable to collect the amount of his policy in case of death; but under this contract the plaintiff takes no risk whatever, he has the money from the start and the defendant takes all of the risk of being able to get it back again; the defendant fully performs the contract on its part in the beginning, and the contract is fully carried out on its part at the outset; there is nothing more for it to do; a complete performance of the terms of the contract depends solely upon the acts of the plaintiff; he gets the money in advance and makes all the promises of future performance, and he does not have to rely upon any promises of the defendant for future performance. It is immaterial to him whether the defendant is solvent or insolvent, and he has no concern in the question as to whether the defendant is ever willing or able to keep its contract, as it will in no event owe him anything; but the reverse is true in case of life insurance."

That Mr. Cone hit very close to the definition given by law writers upon the subject of life insurance, will be seen by comparing the definition with those in the text books.

Walker's American Law, 476.
Black's Law Dictionary.
May in Insurance, Paragraph 8.
13 Am. & Eng. Enc. of Law, 629.

I submit that the Circuit Court of Appeals in quoting from the testimony of appellant's witnesses the statement

of Mr. Stillwell that he invented the plan on which this loan was made, and that it is a "combining the loan and the insurance into one contract;" and of Mr. Cone that "the contract involved in this case is similar to a ten-year loan and a ten-year endowment policy," etc.; and thereupon accepting these statements as a construction of the contract given by appellant's expert witnesses and holding it therefore "a combination of a mortgage loan and a life insurance policy," has reasoned much in the same way as did the Bible student who agreed to prove from scripture that there was no God, and with his thumb over the words "the fool hath said in his heart," pointed out the succeeding statement, "there is no God."

In this slighting way the Circuit Court of Appeals cut out from the language of witnesses, not intended to be technical or exact, certain phrases that by themselves might indicate an opinion on the part of these expert witnesses, which the entire statements made by them showed conclusively that they did not hold. And whatever opinion they held, it seems clear to me that this contract does not come within the definitions of insurance, but is most aptly described by the District Court of St. Louis County, Minnesota, as "an agreement for perpetual forbearance on the part of plaintiff if death occur;" and the appellant had the right to rely upon its judgment and that of the insurance commissioner of the State of Minnesota to that effect.

If this is a life insurance contract, then if the company had sold Krumseig a piece of real estate, taken a mortgage back for a part of the purchase money, and agreed that if Krumseig died before paying off the mortgage it would forgive the debt; that would be life insurance and constitute the company a life insurance company; a proposition too absurd to consider for a moment, but not a whit more absurd than the contention of counsel.

But suppose this were life insurance, pure and simple, it would not follow that we could not collect the amount of our claim under this contract, because we were a foreign company and had not complied with the insurance laws of

the State of Minnesota; even in a law action in which we were plaintiff.

Counsel for appellees in the lower court referred to certain enactments or certain statutes of the State of Minnesota with which he claims that we have not complied, and first, to Sec. 287, Chap. 34, Title 6 of the General Statutes of Minnesota for the year 1878. This section provides that no company hereafter organized in this state shall make insurance upon the lives of individuals, etc., unless organized solely therefor and doing such business exclusively; but the application of this section it is hard to see, for the defendant in this case is not a company organized in this state.

He refers next to Sections 291 and 306 of the General Statutes of 1878, Chap. 34, Title 6, and says that because we did not file with the Insurance Commissioner a copy of our charter or a stipulation as to service of process upon us in the state, we have not complied with the laws of the state. Section 287 is Section 1 of Title 3 of the laws of 1872, and Section 291 is Section 6 of that Title and Section 306 is Section 1 of Chapter 20 of the laws of 1876 and takes the place of Section 21 of Title 3, Chapter 1 of the laws of 1872. Sections 355 and 358 of the General Statutes, Chapter 34, Title 6, are also referred to as requiring a deposit of $100,000 as security for policy holders, and it is contended that as the foregoing sections have not been complied with a contract cannot be enforced which has been made within the state by any foreign insurance company.

In the first place it is doubtful whether the last of those provisions, which are practically superceded by Chapter 225 of the laws of 1889, refer to foreign insurance companies, but if they do it does not follow that if we were an insurance company we would not nevertheless be entitled to sue upon our contract and to enforce the same.

Counsel to support his contention that we would not, quotes from Section 3 of Chapter 76 of the General Statutes of 1878, which provides that "a foreign corporation cannot maintain an action in this state upon an obligation or liability arising out of or in consideration of an act which is

contrary to the law or policy of the state and which is thereby forbidden in respect to corporations or associations therein whose general business is similar to that of such foreign corporations." Assuredly we do not come within the meaning of that statute. That statute provides that we cannot maintain an action on contracts contrary to the law of the state or forbidden by that law in respect to corporations therein whose business is similar to that of such foreign corporation. The meaning of that statute is obvious; if there were any contract by us entered into which a state corporation could not enter into, being forbidden by the law of the state, then we would be within the provisions of the statute, but that is not the case. Foreign corporations have within this state the same rights and privileges and are subject to the same laws as domestic corporations and are deemed domestic corporations and are so legislated by Chapter 183 of the laws of 1885, and among the rights given to domestic corporations is the right to be sued and to sue, etc.

Is Section 3 of Chapter 76 of the Statutes of 1878 is now in force it was enacted not for the purpose of circumscribing the powers of these foreign corporations, but in order that they should not obtain greater rights than domestic corporations, they being legislated to be simply domestic corporations; and the fact of a foreign loan company being permitted to do a life insurance business in this state would not give it a right, privilege or immunity, not possessed by domestic corporations in this state. We believe, moreover, that Section 3 of Chapter 76 of the statutes of 1878 is not now in force and was superceded by Section 6, Chapter 183 of the laws of 1885, and in this opinion Judge Kelley seems to have entirely coincided with us, for in his compilation of the statutes he has left out Section 3 altogether.

As to the claim that appellant not having deposited $100,000 as provided by law for the security of residents of the state, could not lawfully do business here, we maintain that sections of the statutes referred to do not cover the case of the appellant for the reason that the appellant is not within the reason and intent of the law. That law provided

(Chapter 34, Sections 355, 356, 357 and 358), that this deposit shall be made "as security for all its policy holders," whereas no necessity exists for the security of the policy holders, if they be called such, of the defendant. The persons contracting with the defendant had no need of security, for they received their money in advance, were provided with a fund by the company which secured its guarantee, and it could make no difierence to plaintiffs or their representatives whether the defendant failed in business, ceased to do business, sold out, or what happened to it. Not being within the reason of the statute, therefore, the statute could not be held to apply, under the well known rules for the interpretation of statutes. Such seems to have been the ruling of the Insurance Commissioner of the State of Pennsylvania upon a similar contract, as stated by Mr. Hemperly in his deposition, and such also was the ruling of the Insurance Commissioner of our own state, as appears from Mr. Taylor's deposition, on his application to the commissioner. I do not contend that this evidence is competent on this question; but although the court shall not consider it as evidence that would bind the court upon the question, I maintain that it is of use to us in the determination thereof; for the Commissioner is an expert in these matters, placed in position for the purpose of protecting the state and the holders of policies within the state; and his opinion is of great weight, provided there is any question at all as to whether these contracts can be construed as insurance contracts. He is in a *quasi* judicial position, having original authority to determine these questions, and while his decision may not be binding upon this court, it should be as much so as would be the decision of another court. But even if the contract was for life insurance and was made in utter disregard of the requirements of law and defendant was not entitled to do such business in Minnesota; even in that event and in a law court could the respondents, having received all the benefits under it and retained them, attack the contract on that ground? The books are filled with decisions on this question of estoppel on the part of the person

benefited, and I will not go into a lengthy discussion on this point but refer to a few cases.

In the case of Sherwood against Alvis, 3 So. Rep., 307, defendant had secured a loan from a foreign corporation which had not complied with the laws of Alabama regulating foreign corporations doing business in that state; the corporation foreclosed the mortgage, and in an action by the purchaser for possession, the court held the defendant mortgagor estopped from pleading that the mortgage was void for failure to comply with the state law.

Sherwood vs. Alvis, 3 So. Rep., 307. See cases cited in above.
Newburg Petroleum Company vs. Were, 27 O. St., 343.
Am. L. & T. Co. vs. E. & W. R. Co., 37 Fed. Rep., 242.

It is also held by some courts that even where a foreign corporation makes a contract prohibited by the laws of the state, and such prohibition has a penalty attached to it, as is the case in Minnesota, that the penalty is exclusive.

Laws of 1885, Chap 183, Secs. 1, 2, 3, 4, 5 and 7.
Black vs. Page, 6 Ore., 431. See cases cited in above.
Beach on Priv. Cor., Sec. 415.
Fritts vs. Palmer, 122 U. S. 282.
Thornton vs. Nat'l Bank, 71 Mo., 221 and cases cited.

We contend that even if the contract in question was in violation of the statutes of the State of Minnesota, the state alone could complain of it, the contract being an executed one upon the part of the corporation and the defendant retaining all its benefits.

Nat'l Bank vs. Mathews, 98 U. S., 621.
Fritts vs. Palmer, 132 U. S., 282.
Wright vs. Lee, 56 N. W. Rep., 931.

But finally, on this branch of the case, whether or not there were insurance in the contract, and illegal insurance at that, I again assert that respondents are seeking in this case the assistance of a court of equity, and "must come into this court with clean hands." I need hardly further discuss this proposition, or its corollary, that mere illegality in the contract cannot be urged in a court of equity, by one of the voluntary parties thereto. A court of equity will not lend its aid to one who has been in equal wrong with

the defendant, it matters not whether the transaction be intrinsically immoral or a transaction prohibited by statute, as in the case at bar.

This maxim of the law is illustrated in regard to gambling transactions which are clearly prohibited by law and against public policy. It seems to be the rule of the courts, without exception so far as I can find, that the courts will not only refuse to lend their aid for the purpose of enforcing such transactions, but also they will not assist the losing party in setting aside the contracts; the maxim applicable being *"potior est conditio possidentis."*

Kahn vs. Walton, 46 Ohio St., 195, 214.

The court goes on to quote the opinion of the supreme court of Massachusetts in the case of Atwood vs. Fisk, that "the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are *in pari delicto.*"

Atwood vs. Fisk, 101 Mass., 363, 364.

In Weakley vs. Watkins it was held that "a court in chancery will not entertain a bill to cancel an obligation, the consideration of which is violation of chastity, the compounding of a felony, smuggling, gaming, false swearing, or the commission of any crime, or a breach of good morals." The court concedes that such an instrument will be ordered delivered up and cancelled when the complainant has been imposed upon and executed an instrument void for fraud, accident, mistake or other cause, which renders it iniquitous and unjust that it should be enforced against him; but conditioned that the plaintiff himself shall not have violated the laws of good morals or knowingly executed an instrument in violation of good morals or express prohibition, either by common or statute law. The one seeking to enforce such instruments by the judgment of a court of law, and the other seeking by the aid of a court of chancery to

have them cancelled, are equally repelled upon reason and authority.

Weakley vs. Watkins, 7 Humph (Tenn.), 356.
Harrington vs. Bigelow, 11 Paige, 349.

In Tuthill vs. Morris the Court of Appeals of the state of New York laid down the rule in these general terms: "The circumstance that a security has become or is invalid in law, and could not be enforced even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon.

Tuthill vs. Morris, 81 N. Y., 94, 100.

In Deans vs. Robertson the Mississippi supreme court had before it a promissory note and a deed of trust to secure it, given for goods purchased from a merchant doing business without having paid the tax and obtained the privilege license prescribed by the statute, and which on that account are null and void in the hands of such merchant or his assignee. The condition, as far as the prohibition of the statute and the voiding of the securities are concerned, was the same as in the case at bar. The court decided that a bill in chancery to cancel a promissory note and deed of trust null and void under the provisions of that statute, could not be maintained by the debtor without a tender of the amount for which the note was given. The court says, "that a bill to cancel a contract on the ground of illegality will not be maintained unless it offers to pay what is justly due."

Deans vs. Robertson, 64 Miss., 195, 198
1 Pom. Eq. Jur., §§ 391, 402.
1 Story's Eq. Jur., § 642.

On any theory of the case that can be advanced by appellees, whether upon the equity questions involved or upon the merits of the contract, it is clear to me that appellees are not entitled to the relief sought, and I cannot but rely with confidence upon the mathematics of this case as well as the decisions; for it is as certain as that two and two make four that the results claimed by me are demonstrated

by the figures adduced in proof thereof; and in the interests of the parties and for the prevention of much future litigation I trust that this court will decide the questions involved in the contract itself upon the merits of the contract, and will not reverse the appellate court upon equity grounds only.

Respectfully submitted,

Wm C. White

Attorney for Appellant.

id

No. 66. Supt.

JAMES H. McKENNEY, Clerk.

# REPLY OF APPELLANT.

Reply Brief of White for Appt.

## Supreme Court of the United States.

Filed Oct. 24, 1898

October Term, 1898.

No. 66.

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THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, - - Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG, - - Appellees.

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WILLIAM C. WHITE,
Attorney for Appellant.

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DULUTH.
RICHARDSON PRINTING CO., PRINTERS,
1898.

# Supreme Court of the United States

## OCTOBER TERM, 1898.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, - - Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG, - - Appellees.

## APPELLANT'S REPLY BRIEF.

The learned counsel for the Appellees in the above entitled matter, seems to have found it necessary to search for some new method of meeting the questions raised by me upon the equity proposition that "He who seeks equity must do equity." He has therefore at this late hour discovered that his action is based upon Section 5817 of the General Statutes of the State of Minnesota, as follows: "An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims estate or interest therein, or liens upon the same, adverse to him for the purpose of determining such adverse claim, estate, lien or interest."

Proceeding upon this assumption the Counsel then wanders off into an argument intended to convey that if the contract in this case is a life insurance contract and void, the Appellees are entitled to have it set aside independently of any question of usuay for the reason that it constitutes a

cloud upon the plaintiff's title and that clouds upon titles may be removed under such circumstances without the necessity of resorting to the application of the rule in equity; for the State has by Legislation made the instrument such a cloud upon the title.

In the first place the Counsel is mistaken as to the action being in fact an action based upon Section 5817 of the General Statutes of 1894; that section of the statutes has been construed in the State of Minnesota and our courts have determined that a complaint similar to the old bill in equity to cancel the instrument claimed to operate as a cloud upon real estate cannot be treated as a complaint in an action under this statute; all that the complaint need allege of defendant under this statute is that he, (the defendant) claims some estate or interest in or lien on the land, without showing that the claim is invalid or that he (the defendant) does plaintiff any wrong in making it.

The plaintiff having proved his possession or the title and that the lands are vacant, the burden is then on the defendant to prove his adverse claim.

The Supreme Court of Minnesota holds that the position of the parties is the reverse of that held by them in an ordinary action, and in the case of Walton vs. Perkins, 28 Minn., 413, discusses a complaint similar to the one in this case in the following language:—"The complaint being manifestly one in the nature of a bill in equity to remove a specified cloud upon the plaintiff's title, burden is upon him to establish, first, his own title; second, the instrument claimed to be a cloud; third, the invalidity of such instrument.

"The issues tendered relate to these particulars. To allow Plaintiff to alter his complaint as one under the statute is to allow him to make his action one in which all he has to do in order to make a case, is to prove his own title (or possession) leaving defendant to establish his mortgage and its validity.

"The issues tendered in this complaint are entirely different, as respects burden of proof, from that tendered in the

action under the statute. The action being equitable, the issue which it tenders is that which such an action raises, and to allow him to obtain relief under a statutory action would be to allow him to obtain relief not within an issue tendered by him, and would operate as a surprise upon the defendant.

"We think, in order to put on a defendant the onus intended in the statutory action, it must appear from the complaint that the action is brought under the statute, so that he may know from it what he is required to do; and that a complaint clearly one in an action to remove the particular cloud upon real estate, cannot be treated as a complaint in an action under the statute, nor be held to be a good complaint, because the facts stated show that the plaintiff might bring an action under the statute."

The reasoning in this case applies directly to the case before us in which the plaintiff has alleged in his complaint that he is the owner in possession of the realty in question and that the instrument set up in the complaint is a mortgage upon said property and that by reason of facts further stated in the complaint such mortgage is an invalid instrument.

These might be reasons, if the pleading were otherwise sufficient, for allowing the plaintiff relief of the kind given him under the bill in equity to remove a cloud upon the title; but they are not such as will give him the right to relief under the statute in question.

But further than this, I contend that he has not here an action in the nature of a bill in equity to remove a cloud. His action is on the contrary based upon section 2217 of the Statutes of 1894 which reads as follows: "Whenever it satisfactorily appears to the court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, enjoin any proceedings thereon, and shall order the same to be cancelled and given up."

The relief asked for is precisely the relief authorized in this section of the statutes, which is section 6 of the act of 1879 (Laws 1879 C. 66). Note the prayer of the complaint, which after setting up the title and possession in plaintiff and the execution of the mortgage, and its invalidity because based upon a usurious consideration and because containing an unauthorized life insurance contract, thereupon demands relief as follows: "That the said mortgage be cancelled of record, and that defendant be declared to have no interest in said mortgaged premises by virtue thereof, and that the defendant be permanently enjoined from taking any action or proceeding for the enforcement of the same or either of them, and that the said notes be cancelled and delivered up to the said plaintiffs."

This is precisely the relief provided for in section 2217 of the Statutes of 1894 and it is under this section that the counsel has sought to obtain relief. The issue between us is whether he can obtain equitable relief under that section of the statute without first offering to do equity; and whether the statute is not intended in fact to give the party a legal remedy in a case where suit having been begun upon a usurious contract, it is thereafter made to appear in the course of litigation that the contract or security is usurious in fact; it then being made the duty of the court to declare the same void, enjoin further proceedings thereon, and order it cancelled and given up.

The complaint in this action might possibly have been framed with a view to such relief as would be granted under a bill in equity to remove a cloud upon the title;

But if it were so intended it is wanting in averments, showing a necessity for the preventive interference of the court. There are no averments which in fact show necessarily that the mortgage constitutes a cloud, and there is no demand that the cloud upon the title be removed. The indication that there *might* be a cause of action of this nature is not sufficient.

Maloney vs. Finnegan, 38 Minn., 70.

It is too clear for argument to be necessary, that this is an action under Section 2217 as stated, and therefore the statement and argument on pages 2 to 7 of the Appellee's brief absolutely fails, because it is based upon hypotheses that are not warranted in this case. Plaintiff has here invoked the exercise of the peculiar powers of a court of equity, to declare forfeiture of an alleged usurious debt for which he has received a valuable consideration, and there is no relief asked excepting that prescribed by the statute in such case; our contention being, however, that even such relief cannot be had in a court of equity, but will be granted (if at all) only as a legal remedy in an action to enforce the contract or foreclose the security.

This I have fully discussed at pages 10-13 of my original brief herein. It is also familiar law that "when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever it is equitable that he should do before the court will interfere," as stated by the court in the leading New York cased quoted in my original Brief.

Williams vs Fitzhugh, 37 N. Y., 444, 453.

I may be allowed to add a word in reference to the dedision of the Supreme Court of the State of Minnesota, in the case of Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. Rep., 121 (Minn.), referred to in counsel's brief at pages 16 and 26, with the statement that the Supreme Court therein refuses to reverse the former decision as to the non-applicability of the equity rule in usury cases, and with the further statement that the contract in the case at bar is the same contract passed upon in Minnesota heretofore, and that therefore the previous decisions are binding upon us in this case.

I submit in the first place, that an over-worked court has in the case of Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. R., 121, been contented to merely glance at the contract involved in the case; and finding it the same in form and substance as that involved in the case of Misouri, Kansas and Texas Trust Co. vs. McLachlan, 59 Minn., 468, has assumed that there could be no difference in the princi-

ples involved in the two cases, and has contented itself with a "per curiam" opinion to that effect without troubling itself in the least to see whether there were or were not distinguishing features between the two.

It also disposes of the equity question, with the off-hand statement that the statutes were correctly construed in Scott vs. Austin, 36 Minn., 460, without any reference whatever to my arguments based upon the Minnesota statute, and in which attempt was made to answer the prevailing and final opinion of the court in 36 Minn., 460, as I have attempted to do also in the case now at bar. It has seemed to me that the argument in the Matthews case, if fallacious, was at least of enough weight to entitle it to an answer from the court.

That there is a very obvious distinction between the case now at bar and the McLachlan case, I think I have fully shown in my original brief herein; and the same distinction existed in the Matthews case, although the Supreme Court dismissed it in a word, with the statement that it was unable to distinguish between the two. The distinction is clearly demonstrable as a mathematical problem, and my belief is unshaken, that if the court will look into and take the slight trouble to understand the mathematics of this case, it will agree with me that there is in the contract in question not the slightest color or taint of usury.

Respectfully submitted,

WM. C. WHITE,

Attorney for Appellant.

No. 66.

DEC 3 1898
JAMES H. MCKENNEY,
Clerk

Laws of Minnesota filed by Petr.

Filed Dec 3, 1898.

# Supreme Court of the United States.

**OCTOBER TERM, 1898.**

No. 66

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, PETITIONER,

*vs.*

THEODORE M. KRUMSEIG ET AL.

## LAWS OF MINNESOTA REFERRED TO AT PAGE 10 OF BRIEF FOR PETITIONER.

LAWS OF MINNESOTA, GENERAL, 1877.

CHAPTER 15.

An act to amend section one (1), chapter twenty-three (23), of the Revised Statutes of one thousand eight hundred and sixty-six (1866), the same being chapter thirty-eight (38), Bissell's Statutes, relating to interest on money.

*Be it enacted by the legislature of the State of Minnesota:*

SECTION 1. No person, company, or corporation shall, directly or indirectly, take or receive in money, goods or

things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods or things in action, than twelve dollars ($12) on one hundred dollars ($100) for one (1) year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded. But any contract to pay interest not usurious upon interest overdue, shall not be construed to be usury.

* * * * * * *

LAWS OF MINNESOTA, GENERAL, 1879.

CHAPTER 66.

An act relating to interest on money and usury.

*Be it enacted by the legislature of the State of Minnesota:*

SECTION 1. That interest for any legal indebtedness shall be at the rate of seven (7) dollars upon one hundred (100) dollars for a year, unless a different rate is contracted for in writing, and no person, company, or corporation, shall directly or indirectly take or receive in money, goods or things in action or in any other way, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than ten (10) dollars on one hundred (100) dollars for one year; and in the computation of interest upon any bond, note or other instrument or agreement, interest shall not be compounded. But any contract to pay interest not usurious upon interest overdue shall not be construed to be usury.

SEC. 2. Every person who for any such loan or forbearance, shall have paid or delivered any greater sum or value than is above allowed to be received, may by himself or his personal representatives, recover in an action against the person who shall have taken or received the same, or his personal representatives, the full amount of interest or premium so paid, with costs, if such action shall be brought

within two (2) years after such payment or delivery. *Provided*, That one-half of the amount so recovered shall be paid by the officer collecting the same into the county treasury of the county where such penalty is collected, for the use of the common schools.

SEC. 3. All bonds, bills, notes, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever, and all deposits of goods, or anything whatever, whereupon or whereby there shall be reserved, secured or taken any greater sum or value for the loan or forbearance of any money, goods or things in action, than is above prescribed, shall be void, except as to the *bona fide* purchasers of negotiable paper as hereinafter provided in good faith, for a valuable consideration before maturity. *Provided*, That no merely clerical error in the computation of interest made with no intent to avoid the provisions of this act shall constitute usury. *Provided further*, That interest at the rate of one-twelfth of ten per centum for every thirty (30) days, shall be construed not to exceed ten per centum per annum. *Provided further*, That the payment of interest in advance for one year at a rate not to exceed ten per centum per annum, shall not be construed to constitute usury. *Provided further*, That nothing herein shall be construed to prevent the purchase of negotiable mercantile paper, usurious or otherwise, for a valuable consideration, by an innocent purchaser, free from all equities at any price, before the maturity of the same, when there has been no intent to evade the provisions of this act, or where said purchase has not been a part of the original usurious transaction. In any case, however, where the original holder of a usurious note sells the same to an innocent purchaser, the maker of said note or his representatives shall have the right to recover back from the said original holder, the amount of principal and interest paid by him on said note.

SEC. 4. Every person, company or corporation offending against the provisions of this act, shall be compelled to

answer on oath any complaint that may be exhibited or filed against him in the district court for the proper county, for the discovery of any sum of money, goods, or things in action so taken, accepted or received, in violation of any of the foregoing provisions.

SEC. 5. Whenever in any action in any court the defendant shall plead or answer the defense of usury, either party to the action may be a witness in his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except also actions in which the opposite party claims as assignee, and the original assignee is deceased. In case of all notes or other instruments bearing interest, when no rate of interest is specified after maturity, the said note or other instrument shall be construed to bear the same rate of interest after maturity as before, and until fully paid and satisfied.

SEC. 6. Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be canceled and given up.

SEC. 7. Section one (1) of chapter fifteen (15) of the General Laws of one thousand eight hundred and seventy-seven (1877), and section one (1) of chapter twenty-three (23) of the General Statutes of one thousand eight hundred and sixty-six (1866), and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed. But none of the provisions of the act shall apply to mutual building associations.

SEC. 8. This act shall take effect and be in force from and after the first (1st) day of July, A. D. one thousand eight hundred and seventy-nine (1879).

Approved March 5, 1879.

Brief of Morris for Petitioner

728

FILED.

MAR 8 1897

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Filed Mar. 8, 1897.

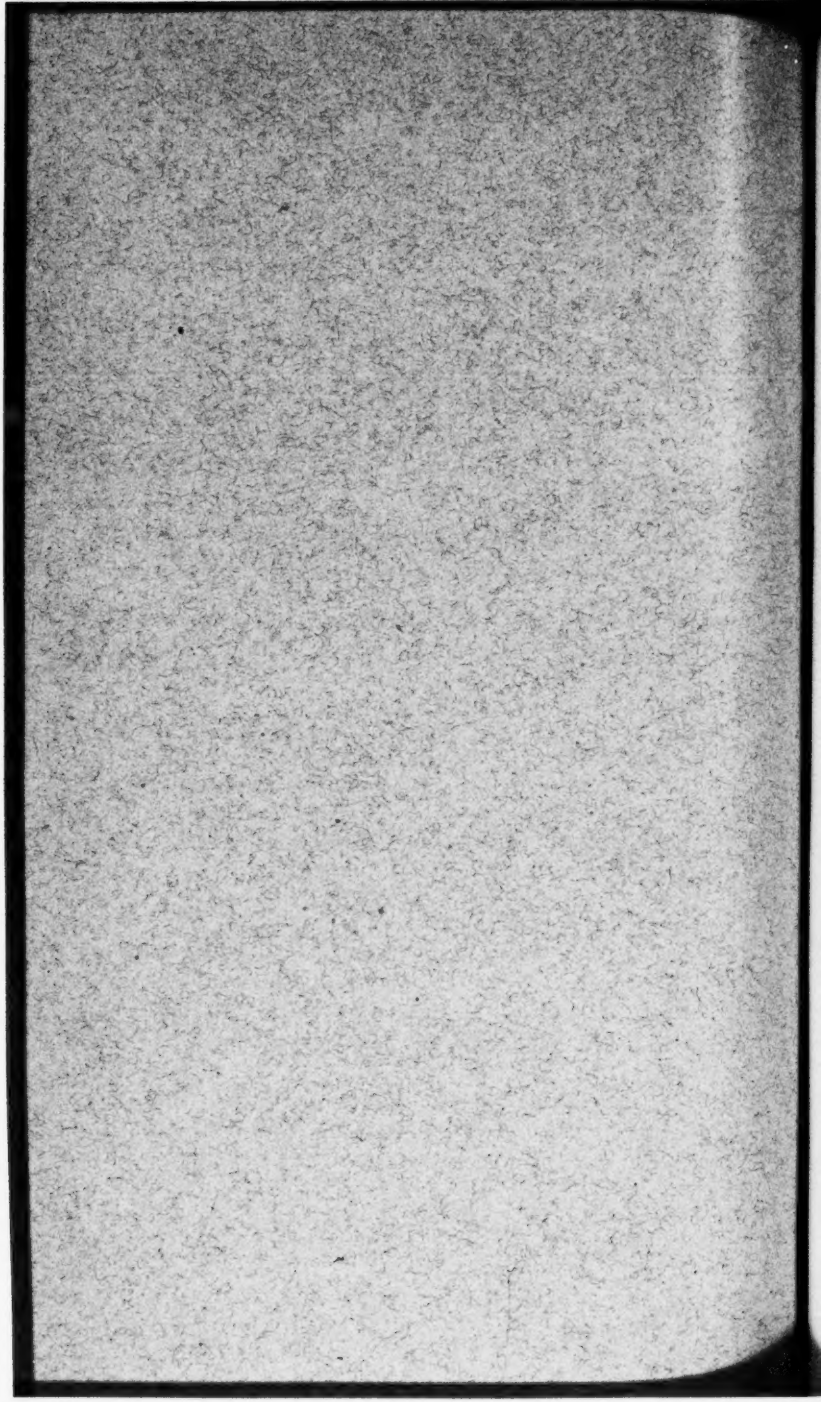
# In the Supreme Court of the United States.

*In re* MISSOURI, KANSAS & TEXAS TRUST COMPANY, Petitioner.

Brief of Theodore M. Krumseig, et al., Appellees, opposing the application of Petitioner for Writ of *Certiorari*.

PAGE MORRIS,

Attorney for Theodore M. Krumseig, et al.



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The petition for Writ of *Certiorari* herein should be denied, as an extraordinary and unnecessary use of the power of this court.

The sole ground alleged by the petitioner is to secure uniformity in the judgments of the courts of the United States.

(Paragraph 19, page 10 of Petition.)

1. Counsel submit that there is no lack of harmony between the general and uniform law on the subject, and the decision of the court of appeals in this case.

2. Counsel further submit, that the error alleged by petitioner only reaches to and effects one branch of the two separate and distinct branches of the case, on either one of which the decision of the court of appeals could securely rest; and that, therefore, in failing to allege error of an independent ground of decision, and in attacking the other, solely, petitioner fails to make out an occasion for use of the extraordinary power so seldom used by this court.

I.

THERE IS NO LACK OF UNIFORMITY BETWEEN THE DECISION COMPLAINED OF BY PETITIONER AND THE LAW.

The error alleged by petitioner is, that the court of appeals held it necessary to recognize the state law and follow it, by holding that it was not a bar to the relief sought by complainants, that they had not offered to repay the sum loaned with lawful interest. The court followed the rule established in the state by

Scott vs. Austin, 36 Minn., 460.
Exley vs. Berryhill, 37 Minn., 182.

This was the law of Minnesota in 1890, when the petitioner's contract was made, and it thus became part of the contract.

Brine vs. Insurance Co., 96 U. S., 627.

The court of appeals held that this right thus established by the Minnesota law was a substantial right and rule of property in the state and was binding on the Federal Court, to which the case had been removed, on ground of diverse citizenship, from the state court.

Petitioner attacks this as error.

The question is, "Is such right given by the state law a substantial one and a rule of property in the state, or is it a mere rule of court and matter of practice?" If mere matter of practice, then the Federal Court was not bound to follow and recognize the right given by the state law. It seems too plain for serious argument, that the right thus given to complainants by the state law is a valuable and substantial one; and that it must follow that the court of appeals committed no error, but decided in perfect harmony with the law established by this court in many cases.

Opinion of Justice Caldwell, on pp. 129, 130 and 131, of printed record herein, and cases cited therein.
Chicago Union Bank vs. Kansas City Bank, 136 U. S., 223.
Etheridge vs. Sperry, 139 U. S., 267.
Brine vs. Insurance Co., 96 U. S., 627.
Bendey vs. Townsend, 109 U. S., 668.
Lippincot vs. Mitchell, 94 U. S., 766.
McGoon vs. Scales, 9 Wall., 23.
Parker vs. Dacres, 130 U. S., 43.
Foster, Federal Practice, Sec. 298.
Beach, Equity Practice, Vol. 1, Sec. 6, and cases cited.

It necessarily follows on the above premises, that complainant's right being substantial and not mere matter of practice and form, that petitioner's alleged ground of lack of uniformity in the judgment complained of, is wholly baseless, and no other point is put forth.

II.

PETITIONER'S ALLEGED ERROR ONLY REACHES ONE OF THE TWO GROUNDS OF THE DECISION.

It rested—

*First.* On the ground that the contract in question was usurious, and that plaintiffs were entitled to have the mortgage cancelled without payment or tender of principal with legal interest.

*Second.* On the ground that the contract was in violation of the state insurance laws and void.

Petitioner's application is deficient, therefore, in not alleging error as to the second above stated ground of the decision complained of.

III.

As to the matters stated in the next to last sentence of paragraph nineteen (19) of the petition, counsel submit that they have no knowledge or information thereof, other than as stated in said petition. As to remarks of one or more judges, verbal or written, they are no matter of record. No certification was made or asked for, and counsel submit that such extraneous matters be not considered.

It is submitted under the authority of

In re. Woods, Petitioner, 143 U. S., 202.

American Construction Co. vs. Jacksonville Railway, 148 U. S., 372.

that the petition should be denied, as not justified by the practice of the court, or the plain purposes of the Act of Congress of March 3rd, 1891, which were to relieve this overburdened court and hasten the end of litigation.

Wherefore, judgment for dismissal of petitioner's application, with costs, is hereby asked for.

Respectfully submitted,

Page Morris.

Attorney for Theodore M. Krumsieg, et al.

J. B. Richards, of Counsel.

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Clerk.

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Br. of Richards for Appellees

# Supreme Court

OCTOBER TERM, A. D. 1898.

Filed Nov. 11, 1898.

THE MISSOURI, KANSAS & TEXAS TRUST COMPANY, *Petitioner*,

*vs.*

THEODORE M. KRUMSIEG AND LOUIS M. KRUMSIEG, *Appellees*.

# APPELLEES' BRIEF.

ON WRIT OF CERTIORARI TO THE UNITED STATES' CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

J. B. RICHARDS,

*Attorney for Appellees.*

COMMERCIAL PRINTING CO., DULUTH.

UNITED STATES

# Supreme Court

OCTOBER TERM, A. D. 1898.

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THE MISSOURI, KANSAS & TEXAS TRUST COMPANY, *Petitioner*,

*vs.*

THEODORE M. KRUMSIEG AND LOUIS M. KRUMSIEG, *Appellees*.

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## APPELLEES' BRIEF.

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The decree of the court below should be affirmed for the reasons given, namely:

1. Because the contract is illegal and void as made in violation of the insurance laws of the state of Minnesota, being an entire and indivisible contract; and the mortgage, a dead thing, a mere cloud on the plaintiff's title, should be removed.

2. On account of usury in the contract.

Appellees make five main propositions in this brief:

1. The contract of the petitioner's notes and mortgage is unenforceable and void under the settled law of the state of Minnesota as a life insurance contract, made in violation of the state insurance laws.

2. The contract is unenforceable and void under the settled law of the state of Minnesota, as being usurious.

3. The decisions and construction by the Supreme Court of the state of Minnesota of its state statutes, and of the effect and character of the petitioner's contract is binding upon this court.

4. That the appellees are entitled to the relief sought in the pending action by virtue of the state statute in relation to the removal of clouds upon the title of lands in the state of Minnesota.

5. That the appellees are entitled to the relief sought under the statutes and decisions of the state of Minnesota relating to the cancellation of usurious securities, without being required as a condition of such relief to pay or tender to the petitioner, principal, and lawful interest, of the sum loaned.

The authorities to maintain propositions four and five will be grouped under one head under title number one.

## I.

APPELLEES ARE ENTITLED TO HAVE THE MORTGAGE CANCELLED OF RECORD, WHETHER THE SAME IS VOID FOR USURY OR IN VIOLATION OF THE STATE INSURANCE LAWS.

This action is based upon section 5817 of the General Statutes of 1894, of the state of Minnesota, as follows:

> "An action may be brought by any person in possession by himself or his tenant, of real property against any person who claims an estate or interest therein, or *liens upon the same*, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest."

Plaintiff's possession is alleged in appellees' complaint (paragraph 1 thereof, page 2 of the transcript), and is admitted in petitioner's answer to the complaint. (Folio 17 of transcript, page 15, second paragraph of the answer.)

Under this statute, if appellant's mortgage lien is shown to be invalid *for any cause*, appellees in possession may have judgment declaring the invalidity and determining appellant's claim and lien, and adjudging title in appellees free therefrom.

The old equity rule regarding the tender of principal and lawful interest before usurious contracts may be set aside has no application in this case, except to the question of usury.

If, therefore, this court shall agree with the decision of the Circuit Court of Appeals, that the contract is a life insurance contract, therefore void under the Minnesota law and decisions, appellees are entitled to have the decree affirmed entirely independent of any question of usury in the case, and the whole burden of the petitioner's brief becomes immaterial herein, as far as same relates to the claim that a tender of principal and lawful interest should be made as a condition of maintaining the appellees' action.

The right of the different states to legislate upon the question of removing clouds from the title to real estate within their several boundaries exists unquestioned. It has many times been affirmed by this court.

Reynolds vs. Crawfordsville First Nat'l Bank, 112 U. S., 405.
Holland vs. Challen, 110 U. S., 15.
Clark vs. Smith, 13 Peters, 195.
Chapman vs. Brewer, 114 U. S., 158 (170.)
United States vs. Wilson, 118 U. S., 86.
More vs. Steinbach, 127 U. S., 70.
Cowley vs. N. P. R. R. Co., 159 U. S., 569.
Roberts vs. N. P. R. R. Co., 158 U. S., 1.
Rich vs. Braxton, 158 U. S., 375.
Bardon vs. Land and River Imp. Co., 157 U. S., 327.
155 U. S., 58.
Arndt vs. Griggs, 134 U. S., 316.
Fitch vs. Creighton, 24 Howard, 159.
Broderick's Will, 21 Wallace, 503 (520).
Ex Parte McNeil, 13 Wallace, 236 (243).

In Clark vs. Smith, 13 Peters, 195, the court says:

"Kentucky has the undoubted power to regulate and protect individual rights to her soil *and to declare what shall be a cloud on titles*; and having so declared, the courts of the United States by removing such clouds are applying an old principle to a new equity created by the legislature, having its origin in the peculiar nature of the country."

Again, in the same case, the court says:

"The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them in practice as we find them and accommodate our modes of procedure in a considerable degree to the nature of the case and the character of the equities involved in the controversy, *so as to give effect to state legislation and state policy*; not departing, however, from what legitimately belongs to the practice of a court of chancery."

The above was a bill in equity to compel the defendant to release his pretended title to certain lands in the state of Kentucky.

The statute of Indiana, construed in 112 U. S., 405, Reynolds vs. Crawfordsville Bank, is broader than the statute of Minnesota, because it allowed an action to be brought by any person, either in *or out of possession*, to determine adverse claims upon the title. The court declared in substance that this Indiana statute *dispensed with the general rule of courts of equity*, that in order to maintain a bill to quiet title it was necessary that the plaintiff should be in possession, and in most cases that his title should be established at law and founded on undisputed evidence or long continued possession.

The court uses the following language:

"It may be conceded that the legislatnre of a state cannot directly enlarge the equitable jurisdiction of a circuit court of the United States. Nevertheless, an

enlargement of equitable rights may be administered by the circuit courts as well as by the courts in the state. Broderick's Will, 21 Wallace, 503 (520). And although a state law cannot give jurisdiction to any federal court, yet it may give a substantive right of such a character that when there is no impediment arising from the residence of the parties the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or common law. Ex Parte McNeil, 13 Wallace, 236 (243.)

"While, therefore, the courts of equity may have generally adopted the rule that a deed void upon its face does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislature of the state in which the court sits to ascertain *what constitutes a cloud upon the title, and what the state laws declare to be such*, the courts of the United States, *sitting in equity*, have jurisdiction to remove."

The court proceeds to say, on page 411 of the same case:

"If the equity courts of the United States in Nebraska *could dispense with all these well established rules of equity and administer rights conferred by this statute*, it is not open to question that in this case the circuit court could disregard similar rules and entertain jurisdiction of the appellee's case and accord to him the rights conferred by the state law, even though the deed under which appellant claims was void on its face. As the same statute authorizes the court to take cognizance of the case even when the title of the defendant amounts to nothing more than a mere cloud, *and applies in every case when the defendant claims an adverse interest in or title to the property in controversy*, it is clear that the assignment of error under consideration has no support."

In this case, the simple allegation that petitioner claims a lien on the property in question adverse to the complaint would have been sufficient when accompanied, as it is, by that of possession of plaintiffs.

Ely vs. Railroad Company, 129 U. S., 291.
Wilder vs. City of St. Paul, 12 Minn., 192 (G. 116.)

In 12 Minn., 192 (G. 116) *supra*, the court says (page 122–3): "Possession of the plaintiff, by himself, or tenant, and an adverse claim by the defendant, *are the only facts which the statute requires to constitute a cause of action.*" citing 2 Minn., 153, (G. 129) Steele vs. Fish.

Under such an allegation any proof is admissable showing invalidity of the lien for any cause. But the complaint plead in detail facts showing the invalidity of the lien of the mortgage on two separate and distinct grounds, viz; invalidity of the life insurance contract, and facts showing usury. The prayer for judgment is to determine the adverse claim of the defendant, and for cancellation of the usurious security.

The above statute unquestionably confers a very substantial right. The effect of petitioner's contention is to destroy the right of the several states to grant such privileges in connection with the removal of clouds upon the title of lands within their limits. Upon reason as well as upon authority it is submitted that this contention is wholly unsound, and that any mere rule of evidence or matter of practice in federal courts in equity, admiralty or common law must give way to a substantial right and rule of property, and be moulded so as to give it full effect. Such, undoubtedly, is the law.

Beach on Modern Equity Practice, Sec. 6.
Foster on Federal Practice, Sec. 7, 2nd Ed.; Sec. 298, 1st Ed.

Mr. Beach lays down the rule as follows (Sec. 6):

"Although the equity jurisdiction of the courts of the United States is subject to no limitation or restraint by the state authorities and is uniform throughout the

different states of the Union; and their practice in equity is not affected by the laws of a state in which they sit; yet, *when a state statute creates a right* and prescribes a mode of proceeding to enforce it in the state courts, *the courts of the United States in that state will enforce the right*, but not always in the mode prescribed by the state law. * * * * Nevertheless, it is desirable when a court of the United States is enforcing a right created by a state statute to follow as near as may be the practice prescribed by the state statute."

Mr. Foster lays down the rule as follows, after stating the general rule as to equity courts' jurisdiction:

"If, however, the *customary* or *statutory law* of a state has created a new right, the federal courts will enforce the same at law or equity if it falls within the remedies authorized by either branch of their jurisdiction."

The general principle above cited is well expressed in the following language of this court in 101 U. S.. 153, Cummings vs. National Bank. On page 157 the court says:

"And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction; we have also held that where a statute of a state *created a new right or provided a new remedy*, the federal courts will enforce that right either on the common law *or equity side* of its docket, as the nature of the new right or new remedy requires. Van Norden vs. Morton, 99 U. S., 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute is to be enforced, and can only be appropriately enforced on the equity side of the court."

And no doubt such is the correct view of the law upon reason and on authority. In addition to the authorities above cited the following maintain the same proposition:

Parker vs. Dacres, 130 U. S., 43.
Chicago Union Bank vs. Kansas City Bank, 136 U. S., 223.
Etheridge vs. Sperry, 139 U. S., 267.
Brine vs. Insurance Co., 96 U. S., 627.
Orvis vs. Powell, 98 U. S., 176.
Life Insurance Co. vs. Cushman, 108 U. S., 51.
Lippincott vs. Mitchell, 94 U. S., 766.
McGoon vs. Scales, 9 Wallace, 23.
United States vs. Fox, 94 U. S., 315.
Clark vs. Graham, 6 Wheat, 577.
United States vs. Crosby, 7 Cranch, 115.
Cummings vs. National Bank, 101 U. S., 153.
Pearsoll vs. Smith, 149 U. S., 231.
Boone vs. R. R., 139 U. S., 684. (In this and the preceding case, the federal court in equity follows the state law of limitations.)

In the state court where this action was brought for the relief sought, appellees were secured in these substantial rights.

Can they be deprived of them by the mere formal removal of the case by the mortgagee to the federal court, that, too, sitting in the same jurisdiction though in equity? I submit not. In Ex Parte McNeil, 13 Wall, 236, (243) this court said:

> "A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there on the same principles and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality."

But appellees did not go into the federal court to invoke the equitable jurisdiction, but brought their action under the state law giving clear right to the relief sought. Petitioner is seeking to apply to appellees the same rule as if plaintiff had sought relief, by going to the state of New York or Missouri seeking a federal equity jurisdiction. In such case it might be held as in Warner vs. Foote, 6 Fed-

eral, 461, cited by petitioner; that, having submitted themselves to a foreign equitable jurisdiction of the federal court they are deprived of the right that would exist in their favor if the action had been brought under the home jurisdiction; but such case is not in point. It was affirmed in this court on another proposition in 112 U. S., 600, solely on the point that plaintiff could not maintain the action because she was not the *owner of the stock pledged*. The remarks of the circuit judge on the subject of usury were apparently incidental and recognized that a different rule might apply had the case been brought in the New York jurisdiction where the contract was made and where the law authorized the relief, without the previous tender of principal and lawful interest But, if authority at all, the case is overborne by 71 Federal Rep., 350, and 77 Federal Rep., 32, directly in point.

The remarks of Justice Caldwell on page 111 of the transcript of record herein, leave nothing to be said on this proposition:

> "It will be conceded," he says, "that if this suit had remained in the state court where it was originally brought, that the appellees would have had the benefit of the state statute. Did they lose that right by the removal of the case into the federal court? The practice in the federal courts in suits in equity is regulated by themselves and by rules established by the Supreme Court of the United States under the authority of an act of Congress, and are uniform throughout the United States and cannot be varied by the state laws. But the question in this case is not one of mere practice but of substantive law. The bill seeks to cancel a mortgage on real estate situated in the state of Minnesota; the mortgage is a cloud upon the title of complainant which, under the statute of Minnesota, he is entitled to have removed unconditionally. The mode of proceeding to accomplish this result is the same in

the federal courts that it is in the state courts, namely, by bill in equity. The statute is not therefore a practice act; it abrogates a rule of equity and secures to the maker of the usurious securities (and he might add, the maker of a note which is void under the insurance laws of the state) a substantive right which may be enforced according to the established and well understood equity practice. It is immaterial whether this right be called legal or equitable; it is an absolute right, and one of which no court can deprive the party. Its enforcement is not dependent on the discretion of the chancellor, nor can a rule of decision based on the supposed authority of the maxim that 'he who seeks equity must do equity,' prevail over a positive statute expressly abrogating that rule of decision. When a court of equity is called upon to deal with a right given by statute, then it accepts and acts upon that other maxim that 'equity follows the law.' It is not competent for any court to take from the citizen a right secured to him by a valid exercise of legislative power."

In Cowley vs. N. P. R. R. Co., 159 U. S., 569, *supra*, identical in principle with the facts here, the court said:

"But while, after the removal of the case to the circuit court of the United States, it might properly be docketed and tried by the court as an equity suit, it still remained, so far as the rights of the plaintiff were concerned, a special proceeding under the territorial statute; and the powers of the court in dealing with it were gauged, not merely by its equity jurisdiction, but by the special authority vested in its own courts by the statutes of the territory. Had the case never been removed to the circuit court, it would have proceeded in the state court as a special proceeding under the territorial statute, and we are of the opinion that, *upon its removal to the circuit court, petitioner lost no*

*right to which he would have been entitled had the case not been removed.* Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence. If any action or proceeding in a state court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a federal court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged.

"Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus, in Ex parte McNeil, 13 Wall., 236, a statute of the state of New York giving to the pilot who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the district court. See, also, the cases of Broderick's Will, 21 Wall., 503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So, in Reynolds vs. Bank, 112 U. S., 405, 5 Sup. Ct., 213, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the circuit court of the United States in that district, to quiet the title of complainant as against such deed, although courts of equity had generally adopted the rule that a deed void

upon its face does not cast a cloud upon the title which a court of equity will undertake to remove. It is also said in Davis vs. Gray, 16 Wall., 223, 231, that 'a party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality. The wise policy of the constitution gives him a choice of tribunals.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15, 3 Sup. Ct., 495; Marshall vs. Holmes, 141 U. S., 589, 12 Sup. Ct., 62; Johnson vs. Waters, 111 U. S., 640, 4 Sup. Ct., 619; Arrowsmith vs. Gleason, 129 U. S., 86, 9 Sup. Ct., 337.

"The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of of the case, unless the court from which it was removed had no jurisdiction."

A word as to the logic of the petitioner's position and the authorities cited in its brief. They are all cited to illustrate the principle above set forth in the quotation from Mr. Beach on Modern Equity Practice, section 6, in the following language:

"That the equity jurisdiction of the courts of the United States is subject to no limitation or restraint by the state authorities and is uniform throughout the different states of the Union, and their general practice in equity is not affected by the laws of a state in which they sit."

We submit that such rule and decisions as applied in this case show mere superficial understanding of the meaning of the language above cited.

The jurisdiction of the federal court is not attacked in this case. No question of jurisdiction arises. It is conceded. These cases, if in point, are flatly opposed by the doctrine of the cases above cited, wherein this court has

recognized a substantial right given by a state law and conformed its equity practice thereto.

But when analized it would fairly seem that no case cited, either in the dissenting opinion of judge Sanborn, of the Eighth Circuit, or by counsel for the petitioner, is in reality in point in this discussion.

Green's Administrator vs Creighton, 23 How., 90, was decided upon the question of jurisdiction, whether the plaintiff, a foreign creditor, was entitled to maintain an action brought in equity in the federal court. No such question arises here. In that case there was a clash between the state law and United States law. Here, there is no clash. United States law, in that case, gave the plaintiff a right to seek a remedy in the federal court.

Clark vs. Bever, 139 U. S., 96, was similiar, as to the right of a foreign creditor under act of Congress to prove his claim against the estate of decedent in the United States court.

Union Bank vs. Jolly's Administrator, 18 How. 503, was a similiar case, involving the probate laws of a state. Payne vs. Hook, 7 Wallace, 425, which appears to be a leading case, belongs to the same category as 23 How. 90, 129 U. S., 96; namely, proceeding of a foreign creditor to collect against estate of decedent, where it was held that the effect of the upholding of the probate proceeding would have been to restrict the jurisdiction directly vested by act of Congress in the non-resident. Such also is Suydam vs. Broadnax, 14 Peters. In these cases it is the question of the jurisdiction of the federal court in equity under United States law where it conflicts with the jurisdiction given under state law, and as to the right at all of the party to have the federal court assume jurisdiction. Manifestly such jurisdictional questions cannot be in point in the case at bar. Robinson vs. Campbell, 3 Wheat., 211, contains nothing, we submit, in conflict with our position; but on the contrary, the statute distinctly declares the

general rule of law that remedies, in respect to real estate, are to be pursued according to the laws of the place where the estate is situated, which is exactly what we contend for in this case; that the mortgagors are entitled to the remedies given them by the laws of the state of Minnesota. United States vs. Howland, 4 Wheat., 108, in our view simply relates to the mode of the protection of a right, a mere matter of practice; and it was conceived that the method of procedure in chancery in the federal court was ample to protect all parties in their essential rights. Noonan vs. Lee, 2 Black, 499, seems to relate solely to a question of the practice of the court. The court chooses not to enforce, in the form of its decree, what seemed to be the practice in the state court in such cases, in allowing a deficiency judgment in an action for the foreclosure of mortgages. On the other hand, in Russell vs. Southard, 12 How., 138, and in Neves vs. Scott, 13 How., 267, cited in some of the cases as tending to support the main proposition of petitioner, expressly recognized an exception where a *custom* or a *state* law gives substantial right; namely, in 13 How., 267, the syllabus says:

> "*Unless the general principles of equity have been modified by the laws and usages of a particular state,* those general principles will be carried out everywhere."

And says on page 271 of the opinion:

> "No question has arisen concerning any state law in Georgia."

In Russell vs. Southard, 12 How., 138, the court states that it is not obliged to follow the state rule of evidence on a question depending on general principles, as to whether parol testimony can be introduced to show a deed absolute on its face to be a mortgage. One ground for its opinion was that there was no statute in Kentucky bearing upon the question of admission or rejection of oral proof in such cases. We submit that the facts of none of the

cases cited in petitioner's brief are in point with those of the case at bar. The question is, can a state law on the subject of usury, in actions to remove clouds on title, be enforced? If the state law is not controlling in favor of the appellees in this case, why should it be controlling in case the mortgagee should have brought his action to foreclose the mortgage in the federal court by bill in equity? In that case, the defendant (mortgagor) sets up the state usury laws and offers to pay no principal nor lawful interest, and pleads perfect bar against the plaintiff's right. Will it be said that the relief will be granted to the plaintiff and his mortgage foreclosed flat in the face of the state law on the subject of usury? Certainly not. And yet, to give the defendant the relief prayed for in his answer would deprive the plaintiff of his right in equity to have at least his principal and lawful interest repaid. It seems to counsel that the contention of counsel for petitioner, in effect, would prevent any state from passing any valid law on the subject of usury, or to allow actions to be maintained to remove clouds from title. On the whole, appellees are not able to present any more logical, thorough and sound reasoning to support the decision of the Court of Appeals in this case than is found in the opinion of Justice Caldwell, as printed in the transcript of record herein, beginning on page 107, and in the opinion of justice Thayer concurring on page 114.

## II.

IT IS SETTLED LAW, AND AN ESTABLISHED RULE OF PROPERTY IN THE STATE OF MINNESOTA, THAT A PLAINTIFF SUING TO CANCEL A MINNESOTA CONTRACT FOR USURY NEED NOT OFFER TO REPAY THE SUM LOANED WITH LAWFUL INTEREST.

Scott vs. Austin, 36 Minn., 460, decided in 1887.

Exley vs. Berryhill, 37 Minn., 182.

Recently (1897) re-affirmed and recognized as against the petitioner in this case, in Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. Rep., 121 (Minn.)

In this latter case the court expressly refused to reverse its decisions in the former case upon the request of petitioner's counsel. These decisions were based upon the statutes of 1878, (sections 2217 and 2214, G. S. 1894.) The language of the statute is as follows: (Section 2217, G. S. 1894; chapter 23, section 7, G. S. 1878.)

> "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void and enjoin any proceeding thereon, and shall order the same to be cancelled and given up."

Section 2214, which is chapter 23, section 4, G. S. 1878.

> "All bonds, bills, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever, and all deposits of goods for anything whatever whereupon and whereby there shall be reserved, secured or taken, any greater sum or value for the loan or forbearance of any money, goods or things in action, than is above prescribed, shall be void, except as to bona fide purchasers of negotiable paper, as hereinafter provided, in good faith for a valuable consideration before maturity. * * * In any case, however, where the original holder of an usurious note sells the same to an innocent purchaser, the maker of said note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note."

Section 2212, General Statutes of 1894 provides that any charge above ten per cent shall be usurious. The rule of law as laid down in 36 Minn., 460, and 37 Minn., 182, was the law in 1890, at the time when petitioner's contract in this case was made and thus the law became part of the contract of petitioner, as fully as if he expressly agreed in

the mortgage itself that the mortgagor might bring an action to cancel the mortgage for usury without tendering the principal and lawful interest.

Brine vs. Insurance Co., 96 U. S., 627.
Rees vs. City of Watertown, 19 Wallace, 107.

Petitioner, therefore, is in no condition to complain about the law of Minnesota on this point, being well advised of it before this contract was made, and as forming part of its contract, *and this court cannot refuse appellees the relief sought, except by changing the original contract of the parties.*

## III.

THE CONTRACT IS ONE OF LIFE INSURANCE, IS VOID AND UNENFORCEABLE, AND SHOULD BE REMOVED AS A MERE CLOUD ON PLAINTIFF'S TITLE.

Gen. Stat., Minn., 1878, chap. 34, title 6, secs. 286, 287, 289, 291, 306, 355, 358, 316, 292, 296, 270.
Laws of 1887, sec. 1, chap. 183.
Gen. State., 1878, sec. 3, chap. 76, being sec. 5891, Gen. Stat., 1894, of Minnesota.
Seamans, Receiver, vs. Christian Brothers Mill Co., 66 Minn., 205.
Seamans, Receiver, vs. Temple Co., 105 Mich., 400.
Seamans, Receiver, vs. Zimmerman, 91 Iowa, 363.

Chapter 76, sec. 3, *supra*, or sec. 5891, Gen. Stat., 1894, is as follows:

> "A foreign corporation cannot maintain an action in this state upon an obligation or liability arising out of, or in consideration of, an act which is contrary to the law or policy of the state, or which is thereby forbidden in respect to corporations or associations therein whose general business is similar to that of such foreign corporation."

This statute is merely declaratory of the general rule of law prevailing in the states, as above cited. See also--

Cincinatti Ins. Co. vs. Rosenthal, 55 Ill., 91; 101 Ill., 206.
Aetna Ins. Co. vs. Harvey, 11 Wis., 364; 44 Wis., 387.
Rising Sun Ins. Co. vs. Slaughter, 20 Ind., 520; 46 Ind., 46.
Barber vs. Boehm, 21 Neb., 450.
Opinion of Justice Caldwell, transcript of record herein.

The statute is constitutional.

Paul vs. Virginia, 8 Wall., 168.
Hooper vs. California, 155 U. S., 648.
Cooper Mnfg. Co. vs. Ferguson, 113 U. S., 727.

The Minnesota statutes above cited are a follows:

"Sec. 286. It is *unlawful* for insurers or their agents to make, negotiate or solicit within this state any contract of insurance except as authorized by this act."

"Sec. 287. LIFE INSURANCE. No company hereafter organized in this state shall make insurance upon the lives of individuals, nor grant, purchase or dispose of annuities, unless organized solely therefor and doing such business exclusively."

By chapter 183, of the laws of 1885, foreign corporations have within the state the same rights and privileges and are subject to the same laws as domestic corporations, and are deemed domestic corporations. This is admitted in petitioner's brief, page 37.

"Sec. 291. Before any insurance company shall commence business in this state the following conditions shall be complied with: 1. It must be fully organized. 2. If it be a company not of this state a copy of its charter, duly accepted, etc., must be filed with the insurance commissioner of the state. 3. It must procure from the insurance commissioner of the state a certificate that it has complied with the conditions of the law of the state applicable to it, and that it is entitled to assume risks and issue policies within the state."

"Sec. 292. AGENTS TO HAVE CERTIFICATE OF AUTHORITY. PENALTY. No person shall act as agent in this state for any company not in this state, in any matter whatever relating to risks, until the last section (291) has been complied with on the part of the company, and he has received from the insurance commissioner a certificate of authority stating that the foregoing requirements have been complied with. * * * Any person or agent doing or attempting to do business in any way relating to insurance in this state without such certificate of authority in violation of this section, or after said certificate shall have been revoked, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred (500) dollars for each offense."

"Sec. 296. If any insurance company doing business in this state shall violate any of the provisions of this act, etc., every director, officer or agent of such company guilty of any wilful participation therein, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding one thousand (1000) dollars or by imprisonment in the county jail not exceeding three (3) months, or by both such fine and imprisonment in the discretion of the court."

"Sec. 270. THE TERM COMPANY DEFINED. The term company, as used in any provision of this act, subjecting companies to any obligation or restriction, includes individuals, partnerships, joint stock associations and corporations."

In Seamans vs. Christian Brothers Mill Co., 66 Minn., 205, above cited, the gist of the decision is in the syllabus, as follows:

"INSURANCE COMPANIES. STATUTORY REQUIREMENTS. EFFECT OF NON-COMPLIANCE. An insurance company which has not complied with the statutory require-

ments so as to be authorized to do business in this state, cannot recover premiums on a contract made within or without the state; and it makes no difference whether such company is a foreign corporation or merely a foreign mutual unincorporated association. Ganser vs. Ins. Co., 25 N. W., 943, 34 Minn., 372, holding that in such a case the insured may recover the loss distinguished, on the ground that the very object of the said statutory requirements is the protection of the insured, and the parties are not in *pari delicto.*"

The court says:

"These statutory provisions are police regulations intended to protect people and property in this state against spurious and irresponsible insurance companies. It is plainly the intent of these statutory provisions to compel all such insurers doing business in or taking risks on property in this state to comply with our local laws and submit to our local courts. * * * * The restrictions in our statutes are so many and the repressive character such that we must hold this to be the public policy of this state. This seems also to be the character of the insurance legislation in Iowa and Michigan, as appears by the case of Seaman vs. Zimmerman, 91 Iowa, 363, and Seaman vs. Temple Co., 105 Mich., 400, where this same receiver was defeated in attempt to collect unpaid premiums from citizens of those states. Neither does it make any difference that the insurer is a mutual company or that it is, as appellant claims, unincorporated. Neither is this decision in conflict with Ganser vs. Ins. Co., 34 Minn., 372, where it was held that the insured can recover the loss even though the insurer has not complied with the statutory requirements so as to be authorized to do business in this state. The very object of these statutory provisions is the protection of the insured, and parties are not in *pari delicto.*"

It is thus seen that no estoppel exists, as contended for by petitioner's counsel, under the settled law of the state of Minnesota, against a party seeking to evade payment of an insurance contract, void under the state laws. No authorities are needed to show that no such estoppel exists in usury cases.

It is, then, the settled law in the state of Minnesota, that any insurance contract, whether fire, marine, hail or life, made in violation of the state insurance laws is void and cannot be enforced. It is admitted in the answer of the petitioner (page 16 of the transcript of record, paragraph 6 of the answer) that the mortgagee has not complied with any of the laws of Minnesota respecting the transaction of life insurance business in this state.

Therefore, this particular mortgage contract of the petitioner must be held void and a mere cloud on plaintiff's title, if this court shall decide that the contract is one of *insurance*.

That it is a contract of insurance admits of no doubt, and is sustained by the authority of Justice Caldwell of the circuit court, and was evidently the idea of the supreme court of Minnesota in 59 Minn., 468; although the point was not necessary to the decision of the court in that case. The language of Justice Caldwell (page 113 of the transcript) is as follows:

> "Accepting the construction of this contract given by the appellant's expert witnesses, one of whom, to use his own language, 'invented the plan,' we must hold that the contract is, in the language of another of appellant's witnesses, 'a combination of a mortgage loan and a life insurance policy'."

For the testimony upon this point, see pages 78 and 79 of transcript, testimony of Arthur E. Stillwell; page 62 of transcript, testimony of John B. Lunger, who says: "In brief, the contract is *a combination of a mortgage loan*, payable in installments, *and a life insurance policy*."

The language of the supreme court of the state of Minnesota in M. K. & T. Trust Company vs. McLachlan, 59 Minn., 468, found on page 108 of the transcript, shows that the contract was deemed an insurance contract. Speaking of the contract the court says:

> "It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state."

The clause of the mortgage which is claimed to be an insurance feature is as follows (page 5 of transcript):

> "And it is further understood by and between the said parties of the first part, their executors, administrators and assigns, and the said party of the second part, the Missouri, Kansas and Texas Trust Company, that in case said Theodore M. Krumseig, one of the parties of the first part, *should die after the execution and delivery of the said notes and this mortgage, and within ten (10) years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied* provided, however, that said parties of the first part shall have promptly paid each monthly installment that shall have become due prior to his death, according to the terms of the said notes hereinbefore mentioned; and that he has not committed suicide within two years and has not, without the written consent of the party of the second part, visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train or of a steam or sailing vessel for two years."

Petitioner's claim is, that this contract is not one of life insurance, because there is no provision for any cash payment by it in case of death.

What is payment? Payment here is the full, agreed and exact equivalent of the actual cash loaned on the particular security. The cancellation of the notes and mortgage in case of death is in every respect the same to appellant as the payment of actual cash to the legal representatives. What was the object of the agreement if not to furnish means to pay the notes? Yet, forsooth, when the notes and mortgage are cancelled and satisfied they have not been "*paid.*"

What determines the character of a contract is its *legal effect.* "The tree is known of its fruit." There is no uncertainty as the amount due on the mortgage in case of death. No cash passes; but this is because the contract is graduated so that the amount due upon the "policy" is always the exact equivalent of the unpaid notes. The amounts are $30 less each month. Petitioner's liability ceases when any installment is not paid when due. (Page 5 of transcript.) The sum due on the "policy" is thus always exactly fixed and represented by the notes unpaid at the time of death.

"That is certain which can be made certain."

If this is not life insurance, what is it? In fire insurance, loss occurs by fire. In plate glass, hail and marine insurance it is loss by breakage, marine disaster and hail. In life insurance, loss occurs by death of the individual, through stoppage of income or of inability to pay by death. Indemnity is the idea pervading every kind of insurance, though in life insurance there is often possibility of something more.

May on Insurance, sec. 117, p. 130.
Ins. Co. vs. Bailey, 13 Wall., 616.
Phillips on Insurance, sec. 1.
Walker's American Law, p. 471.

Did not appellant *re-insure* its risk with the New Jersey Company? It admits that the New Jersey Company insured life for its benefit. Now, then, is not its own contract with appellees a *life insurance* contract? Appellees never had any dealings with the New Jersey Company. It is apparant from examination of petitioner's contract with the Prudential Company, (Exhibit "A," transcript, pages 30 31 and 32) that petitioner was the Prudential Company's agent receiving commission, 25 per cent on first year and afterwards 10 per cent on all premiums paid by the appellees. (Article 7, Ex. "A," page 32 of transcript.) And it further appears, that the contracts made between said parties were *insurance* contracts. (Arts. 1 and 2, Ex. "A," page 30 of transcript.) But this agency of petitioner was carefully concealed from appellees for obvious reasons. Appellees paid the $3.00 fee to petitioner and passed the medical examination required, and the medical report was then submitted by petitioner to the New Jersey Company, and upon its favorable report the notes and mortgage described in the complaint were executed and delivered.

That the character of the contract is one of life insurance is furthur illustrated in the stipulation in reference to *suicide*, visiting the *torrid zone*, and extra hazardous occupations found in all careful regular insurance policies, as well as by the great care taken to obtain a good and satisfactory "risk" by the medical examination.

The form of a contract is immaterial. It need not even be in writing.

> May on Insurance, sec. 1, 35, 27.
> 11 Am. and Eng. Enc. of Law, pp. 280–281.

It is submitted that this contract comes within all the definitions cited in petitioner's brief, and any other that could be given, of life insurance; and must be held to be a life insurance on the life of Krumseig, and it is submitted that the opinions of the supreme court of the state of Min-

nesota and of Justice Caldwell, of the Circuit Court of Appeals, on this subject are correct.

Therefore, it follows that the contract is void under the above cited law of the state of Minnesota. If it be claimed that the *insurance* part of it might be void, but that the rest of the contract could be enforced, the answer is that the contract is *indivisible and entire*. Each installment of $30 of the notes contained a portion of the principal sum loaned, a portion of the interest thereon, and a portion agreed to be paid for the insurance premium. But the part agreed to be paid for the insurance clause in the mortgage cannot be separated from the rest of the said notes, on account of the fact that no rate of interest is any where specified, but the notes are blanket in form for the full sum of $3600, payable in installments. The taint of the illegality, therefore, permeates each installment and every part of the notes; and the whole falls because the insurance contract was in violation of the law.

Parson on Contracts, Vol. 1, p. 380.
Smith on Contracts, secs. 177, 178, p. 206.

It is submitted, therefore, upon this ground alone, wholly independent of the usury feature of the contract, that the decree of the Circuit Court of Appeals should be affirmed.

## IV.

THE CONTRACT IS USURIOUS AND VOID.

Mathews v. Missouri, Kansas & Texas Trust Co., 72 N. W. Rep., p. 121, (Minn.) decided in June, 1897.
M. K. & T. Trust Co. vs. McLachlan, 59 Minn., 468.
Krumsieg vs. M. K. & T. Trust Co., 77 Fed., 32; opinion contained in the transcript herein.
Krumseig vs. M. K. & T. Trust Co., 71 Fed., 350, and cases cited in the above opinions.

The supreme court of Minnesota, in its decision in 72 N. W. Rep., 121, *supra*, uses the following language:

"2. It is further objected by the defendant that the finding and decision of the trial court, to the effect that the notes and mortgage were usurious and void, are not supported by the evidence. The contract here in question, as evidenced by the notes and mortgage, is identical, except as to names, dates and amounts, which the contract held to be usurious in the case of Trust Co. vs. McLachlan, 59 Minn., 468, 61 N. W. Rep., 560, to which reference is here made for a statement of the general terms of the contract here in question. A like contract was also held usurious in the case of Trust Co. vs. Krumseig, 23 C. C. A. 1, 77 Fed. Rep., 32. We are unable to distinguish this case from the McLachlan case. The finding and decision of the trial court are sustained by the evidence."

In the case at bar, the contract is the one referred to by the supreme court in the above decision. This contract is identical, except as to names, dates, amounts and descriptions of property, with the contract held to be usurious in Mathews vs. M. K. & T. Trust Co., 59 Minn., 468, and 72 N. W. Rep., 121. The forms of the contract were on printed blanks of the trust company, both applications, notes and mortgages. Counsel submits, that these decisions of the supreme court of the state of Minnesota, construing this particular contract, are binding as a rule of action for this court upon the same, on this point of usury, as well as upon the proposition that an insurance contract of a non-resident corporation is void in the state of Minnesota, when made without complying with the state insurance laws.

Generally, upon the subject of usury, the following authorities are submitted:

Missouri Valley Life Ins. Co. vs. Kittle, 2 Fed. Rep., 113; 2 McCrary, 134.

National Life Ins. Co. vs. Hanley, 7 Fed. Rep., 805.

Doe vs. Barnard, 1 Esp. Rep., 11.

Clark vs. Sheehan, 47 N. Y., 188.

Utica Ins. Co. vs. Cadwell, 3 Wend., 296.
Fire Ins. Co. vs. Donaldson, 3 Edw. Ch., 199.
Chase vs. N. Y. Mortgage Co., 49 Minn., 111.

Appellant is presumed to have intended to do what it has deliberately done.

Fiedler vs. Darrin, 50 N. Y., 443.
Firemen's Ins. Co. vs. Ely, 2 Cowen, 708 (N. Y.).
Cleveland vs. Loder, 7 Paige, 587.

Only a fair preponderance of evidence is required to show usury.

M. K. & T. Trust Co. vs. McLachlan, 59 Minn., 468.
Lukens vs. Hazlett, 37 Minn., 441.

That the mortgagor might be wholly ignorant of the vicious character of the contract is wholly immaterial.

Lukens vs. Hazlett, 37 Minn., 441.
Marsh vs. Martindale, 3 Bos. & P., 154.
Thompson vs. Nesbitt, 2 Rich., 73.

This particular contract of the petitioner has been seven times before various courts of the United States for construction, and seven times it has been condemned as usurious; namely, twice in the district court of St. Louis county, Minnesota, viz, in the McLachlan and Mathews cases; twice in the United States Circuit Court for the district of Minnesota, before Judge Nelson, viz, in the cases Krumseig and John L. Foote; twice in the supreme court of the state of Minnesota, viz, in the McLachlan and Mathews cases; and once in the United States Circuit Court of Appeals in the pending case. It remains for this court to set its final seal of condemnation upon this particular form of contract.

The only difference between the case at bar and the McLachlan case above cited is, that the petitioner now chooses to deny what it freely admitted in the McLachlan case; namely, the value of the insurance feature of the contract. Defendant's counsel, in its brief, admits that

the McLachlan case was rightly decided. (Page 15 of its brief.) In the McLachlan case the insurance feature was admitted to be worth but $852.91, leaving $810.09 of exaction to be accounted for. The same relative discrepancy exists here; and counsel instead of admitting that this discrepancy is that of a charge for ordinary life insurance at Krumseig's age and on the amount risked, now chooses to contend that there is some endowment feature in the contract justifying the excessive charge made.

*Appellees respectfully submit that there is no endowment feature in the contract, or any thing like it, or any thing that can show a fair equivalent for the amount of the notes.*

The contract is seen in detail in the following table. One-tenth of the total of the notes is payable each year (or rather, 1–120th each month.) The one-tenth of principal is, (for convenience take, instead of $1970, $2000) $200; and the other $160 payable yearly is explained in the loan application as "interest and *cost of guarantee to cancel debt in case of death.*" (Transcript, page 42.)

Combined yearly payment is $360.

| Year | Principal | Interest and Guaranty | | | | |
|---|---|---|---|---|---|---|
| 1 | Payment, $360 | ($200 plus $160). | This $160 is | | .08 on | $2,000 in use. |
| 2 | " | " | " | " | .088 on | 1,800 " |
| 3 | " | " | " | " | .10 on | 1,600 " |
| 4 | " | " | " | " | .114 on | 1,400 " |
| 5 | " | " | " | " | .133 on | 1,200 " |
| 6 | " | " | " | " | .16 on | 1,000 " |
| 7 | " | " | " | " | .20 on | 800 " |
| 8 | " | " | " | " | .266 on | 600 " |
| 9 | " | " | " | " | .40 on | 400 " |
| 10 | " | " | " | " | .80 on | 200 " |
| | $3,600 | | 10)2.261 | | | 10)11,000 |
| | | | $ .26 | | | $1,100 |

Divide 2.261 by 10, gives .26 average per cent.

Divide $11,000 by 10, gives $1,100 average sum in use.

In the first year the return to appellant is equivalent to eight per cent interest. Very fair and innocent! The tenth year only $200 is in use. In fact, only the average of $100 is actually in use the last year, on account of the monthly payments of $30. Yet, the same perennial $160 is exacted for its use, as is the case in each year on the constantly decreasing principal sum.

In the last year the $160 is 80 per cent interest on the $200; and is 160 per cent on the $100 actually in average use!

Average principal in use is thus $1,100.

Average interest and premium combined is thus 22 6-10 per cent per year on the sum in use.

If the calculation was based on the fact of *monthly* instead of *yearly* payments, the rate of profit would appear much greater.

Cost of "guaranty" is only $124.05 for the ten years, and averages $12.40 per year. This, figured down as interest on the average $1100 in use is less than two per cent per year. (Two per cent on $1100 is $22.) In the loan application the notes are said to be given for "principal, interest and *cost of guaranty* to cancel debt in case of death." (Transcript, p.42.) This (net) cost to appellant is proven to be only $124.05. Why is not this sum the *contract* limit of the value of that part of the consideration? We submit that it is and should be, and ask what is the basis of its exaction of $621.80 instead?

The rate will appear greater than 20.6 per cent per year, if, as is correct, the calculation should be based on the monthly instead of yearly payments.

Thus this contract exacts a profit on the loan equivalent to more than 20.6 per cent interest per annum. Appellant is not a building and loan society. This is admitted. For it, it is usury.

Another distinct and striking feature of this remarkable contract, and showing usurious intent is the extraor-

dinary result from the provision for ten per cent interest on each overdue installment, commencing at the very first and running all through the ten years.

Pike vs. Grist, 62 Ill., 461.

In ordinary contracts this provision cuts no material figure and is regarded rather in nature of a penalty. Here it reaches of itself alone the enormous total of $1,815.30.

If nothing were paid on the contract till its maturity the sum required in its liquidation would be $5,415.30 for loan of $1,970.

Considering that the statutes of limitation could not affect the mortgage (however it might affect some of the notes) this single feature provides for $1,291.25 excess over total principal, interest for ten years at ten per cent, and insurance premiums or guaranty.

$2,000 plus $2,000 interest, plus $124.05, equals $4,124.05. From $5,315.36 deduct the $4,124.05 leaves $1,291.25 as the net result and effect of this single feature of the contract. All that was necessary to make this clear profit of $1,291.25, aside from all other sources of profit, was to exact ample security by the mortgage, *as appellant did in this case.*

(As demonstration, there are 120 installments. Interest at ten per cent for each $30 for one month is $0.25. The first installment will double itself in the ten years. Interest on each of the succeeding installments is just $0.25 less than that of its predecessor, and the total is $1,815.30.)

A third ugly feature is, that while right to indemnify lapses upon default of payment on any single installment, when due, (transcript, fols. 6, 8) yet, there being no fixed or determinable premium charge, appellant's right to collect the whole sum of $3,600 is not impaired by such lapse. In such case the sum of $124.05, fairly chargeable for the ten years' premium, would all go to swell the profit on the loan as an additional source of usury (less only the pre-

miums already earned). This because appellant could claim exemption from any liability after default.

## TABLE I.

Table showing "COST" to petitioner of its re-insurance of the Krumseig "RISK" computed according to the terms of its February 27, 1889, contract with the Prudential Insurance Company of America, of Newark, N. Y., (Ex. "A," pp. 30–33 of transcript) the contract being there described (Article 2) as the "Renewable, Reducing, Non-participating," "Term" plan, renewable for ten years, at premium rates set out in a table in the contract the amount of the insurance decreasing each year according to a table also set out in article 7 of said contract. Appellant took out its policy No. 4452 on Krumseig's life under the terms of the said contract of February 27, 1889, for $2,208. (Page 41 of transcript.)

| Year | Age | Rate (quarterly) | Amt. Ins. per contract. | Annual Cost. |
|---|---|---|---|---|
| 1 | 28 | $2.86 on $1,000 | $2,000 | (5.82x4) –($22.88 |
| 2 | 29 | 2.92 " (2x902) | 1,904 | (2.92x3) (1000) |
| | | | | (2.35x4) ( 804)– 21.08 |
| 3 | 30 | 2.99 " | 1,658 | (2.99x4) (1000) |
| | | | | (1.96x4) ( 658)– 19.80 |
| 4 | 31 | 3.05 " | 1,496 | (3.05x4) (1000) |
| | | | | (1.61x4) ( 486)– 18.24 |
| 5 | 32 | 3.13 " | 1,320 | (3.13x4) (1000) |
| | | | | (1.00x4) ( 320)– 16.52 |
| 6 | 33 | 3.20 " | 1,124 | (3.20x4) (1000) |
| | | | | ( .40x4) ( 124)– 14.40 |
| 7 | 34 | 3.28 " | 910 | (2.98x4) ( 910)– 11.92 |
| 8 | 35 | 3.37 " | 674 | (2.27x4) – 9.08 |
| 9 | 36 | 3.45 " | 414 | (1.43x4) – 5.72 |
| 10 | 37 | 3.54 " | 140 | ( .2x70) (.50x4)– 2.00 |
| | | | | $141.64 |

Total cost of its re-insurance with the Prudential company on basis of $2,000, its legitimate risk.

This, too, is to be reduced by petitioner's commission on the premiums paid, which, by the contract, are twenty-five per cent on the first year's premiums and ten per cent on those of each subsequent year. Appellant actually took out re-insurance for $2,208, or $208 more than its risk. This extra cost, however, cannot be taxed to the appelees in the calculation.

It got its indemnity for about *$19.23 less than Krumseig could have got it for.*

Yet appellant has the astonishing audacity to undertake to make the court think that it is entitled to charge, in its contract with plaintiffs, the rate of *endowment* policies, which are thirteen times ($92 per $1,000) as much for what only costs itself $6.20 per $1,000; and to undertake to make the court believe that the principle of so-called "endowment" enters into its contract, or that it is giving the "equivalent" of endowment insurance. (See pages 47, 51, 52, 55 of transcript, for testimony as to ordinary *endowment* rates.)

## TABLE II.

Table showing cost to Krumseig in 1890, at the highest known rate for insurance on the amount risked by appellant in its contract with him. The rates of premium are those testified to by Squier and Covey (transcript, pp. 36–41), and the plan is that shown in the appellant's contract with the Prudential Insurance Company of America, of Newark, N. J., viz: "Renewable," "Reducing," "Non-participating," "Term" plan, covering the ten year period; and the amounts are those risked at the beginning of each year with *no* reductions on account of the monthly payments made under the contract, which really make the risk largely less than the following table shows:

| Year | Age | Rate (annual | Am't Ins. | | Annual Cost |
|---|---|---|---|---|---|
| 1 | 28 | $13.76 per $1000 | $2000 | | $27.52 |
| 2 | 29 | 14.00 " | 1800 | [18/10 x $14.00]- | 25.20 |
| 3 | 30 | 14.26 " | 1600 | [16/10 x 14.26]- | 22.82 |
| 4 | 31 | 14.54 " | 1400 | [14/10 x 14.54]- | 20.34 |
| 5 | 32 | 14.84 " | 1200 | [12/10 x 14.84]- | 17.81 |
| 6 | 33 | 15.17 " | 1000 | | - 15.17 |
| 7 | 34 | 15.52 " | 800 | [ 8/10 x 15.52]- | 12.40 |
| 8 | 35 | 15.89 " | 600 | [ 6/10 x 15.89]- | 9.54 |
| 9 | 36 | 16.31 " | 400 | [ 4/10 x 16.31]- | 6.52 |
| 10 | 37 | 16.75 " | 200 | [ 2/10 x 16.75]- | 3.35 |
| | | Total cost at highest known rates, | | - | $160.67 |

The monthly deductions of the amount risked, by the payments so made, should reduce the actual cost certainly enough to *more than off-set extra cost to defendant of collecting its premiums monthly.* It paid its own premiums quarterly, and the difference between its annual and quarterly rate is set forth in the schedule of premium rates in its contract of February 27, 1889 (p. 31). Its annual rate per $1,000 is $10.80; the quarterly rate is $2.86, or $11.44 a year. This is only $0.64 per year more than if it paid once a year instead of quarterly. The difference in cost of annual, or quarterly, or monthly payments of premiums is not material.

The contract is *reduced* in amount in amount 1/120 each month. Of *principal* this is exactly $16 66 2/3. Interest at ten per cent for one month on the $16 66 2/3 is $0.13 8/10. Interest on the monies in the borrower's hands during the life of this contract, at ten per cent, so reducing $16.66 2/3 every month amounts to $1,008.20. The first year it is $190.82, the next year $170.82. It reduces $20 every year, or ten per cent of $2,000. Interest the last year would be $10.82.

| | |
|---|---|
| Total principal, | $1,970.00 |
| Total Interest (10 yrs. @ 10 per cent, | 1,008.20 |
| Total cost to appellant of its re-insurrisk, (really only $124.05) | 141.64 |
| Total consideration, | $3,119.84 |
| Face of notes, | $3,600.00 |
| Deduct actual consideration, | 3,119.84 |
| Total exaction, | $ 480.16 |

About *one-quarter* of the actual cash loaned!

Add to this exaction the commission earned by appellant, as agent, $17.59, makes the actual total exaction $497.75.

## V.

THE DECISIONS AND CONSTRUCTION BY THE SUPREME COURT OF MINNESOTA OF ITS STATE STATUTES, AND THE EFFECT AND CHARACTER OF THE PETITIONER'S CONTRACT, IS BINDING UPON THIS COURT.

In addition to the authorities heretofore cited in title number one, which also bear upon the above proposition, the following are cited:

Bauerman vs. Blunt, 147 U. S., 647.
Peters vs. Bain, 133 U. S., 670.
Bergman vs. Bly, 66 Fed., 40.
Detroit vs. Osborne, 135 U. S., 492.
Union Bank vs. Kansas City Bank, 136 U. S., 223.
Etheridge vs. Sperry, 139 U. S., 267.
Christie vs. Pridgeon, 4 Wall., 196.
Opinion of Justice Caldwell in transcript.

And generally the character, interpretation, force and effect of a contract must be governed by the laws of the state.

"The laws of the state in which land is situated

control exclusively its alienation and transfer, and the effect and construction of instruments intended to convey it. United States vs. Fox, 94 U. S., 315; United States vs. Crosby, 7 Cranch, 115; Clark vs. Graham, 6 Wheat., 577; McGoon vs. Scales, 9 Wall., 23."

Opinion of Justice Caldwell, page 112 of transcript:

"All such laws in existence when contracts in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract. Brine vs. Hartford Fire Ins. Co., 96 U. S., 627." *Ibid.*

In 9 Wall., 23, *supra*, the court said (page 27):

"It is a principle too firmly established to admit of dispute at this day. that to the law of the state in which the land is situated must we look for the rules which govern its decent, alienation and transfer, and for the effect and construction of conveyances."

Here is the question of the construction, effect and validity of a mortgage upon land in Minnesota, made in Minnesota, to be enforced in Minnesota, and by which title to land may pass to the mortgagee.

The case is one, it would seem, where the rule cited unerringly applies with the fullest force.

In 96 U. S., 627, *supra*, the court (page 634) endorsed the following proposition:

"All the means by which the title to real property is transferred, whether by deed, by will or by judicial proceeding, are subject to and may be governed by the the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract, *and all the laws of a state existing at the time a mortgage or any other contract is made, enters into and becomes a part of it*, and are obligatory on all courts which assume to give remedy on such contracts."

It is immaterial that the same statute is interpreted differently in the different states. The state law becomes by the interpretations, as far as it is a rule for the action of this court, a different law in one state from what it is in another. The court said in Bergman vs. Bly, *supra*, page 43:

> "The general rule is, that the laws of the several states shall be regarded as rules of decision in the courts of the United States in cases to which they apply. The judiciary act requires this, and it would be the law independently of that enactment. Under this rule the first question which confronts a federal appellate court is what is the local law applicable to the case? The local law which furnishes the rule of decision may consist of a statute or of the decisions of its supreme court, or both. The construction placed upon the state statute by the supreme court of the state is obligatory on the federal courts. The judicial interpretation of a statute becomes in effect a part of the text of the statute itself. It does not matter how like statutes in other states have been construed. The construction of a statute by the supreme court of the state from which the case comes is the law of that state and furnishes the rule of decision. It not frequently occurs that the same statute is differently interpreted, or the same question differently decided by the supreme courts of different states. When that is the case, the federal appellate court gives effect to the local law of the state applicable to the case. It does not attempt to reconcile the conflicting dicisions of the state courts or to adopt a rule of decision different from that established by the supreme court of the state from which the case comes. It contents itself by giving effect to the local law."

Nothing can well be added to the above. It disposes of the contention of petitioner's counsel, in his brief, that because formerly the construction of the Arkansas usury

statute was different from the present construction of the New York and Minnesota statutes, that it is necessary for this court to interfere and force a uniformity of decisions upon the local statutes of the different states. No principle of general commercial law is here involved. No one is deprived of vested rights and there is no discrimination against non-residents. In fact, the petitioner made this contract with the law of the state of Minnesota as part of the contract at the time it was made.

Counsel submits, therefore, that this court should affirm the decree of the Circuit Court of Appeals on either or both of the grounds therein set forth as found in the decision.

Respectfully submitted,

J. D. Richards
Duluth, Minn.

*Attorney for Appellees.*

# MISSOURI, KANSAS & TEXAS TRUST COMPANY *v.* KRUMSEIG.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 66. Argued December 2, 1898. — Decided January 3, 1899.

Usury is a statutory offence, and Federal courts, in dealing with such a question, must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts.

When a State thinks that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, as in this case, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity, or at law; and the local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision.

Opinion of the Court.

These views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal.

Whether the contract between the parties in this case was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota, has not been considered by the court.

In May, 1894, Theodore M. Krumseig and Louise Krumseig filed in the district court of the eleventh judicial district of Minnesota a bill of complaint against the Missouri, Kansas and Texas Trust Company, a corporation of the State of Missouri, praying that, for reasons alleged in the bill, a certain mortgage made by complainants on the 5th day of September, 1890, and delivered to the defendant, and by it recorded, and certain notes therein mentioned, might be cancelled, and the defendant be permanently enjoined from enforcing the same. The defendant thereupon, by due proceedings, removed the cause to the Circuit Court of the United States for the District of Minnesota, where the Union Trust Company of Philadelphia was made a co-defendant, and the case was so proceeded in that, on October 22, 1895, a final decree was entered, granting the prayers of the complainants, declaring the said mortgage and notes to be void, and enjoining the defendants from ever taking any action or proceeding for their enforcement. 71 Fed. Rep. 350.

From this decree an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, where, on November 5, 1896, the decree of the Circuit Court was affirmed. 40 U. S. App. 620. On March 20, 1897, on petition of the Missouri, Kansas and Texas Trust Company, a writ of certiorari was awarded whereby the record and proceedings in said cause were brought for review into this court.

*Mr. William C. White* for the Trust Company.

*Mr. J. B. Richards* for Krumseig.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The bill of complaint alleged that on July 27, 1890, Theodore M. Krumseig, one of the complainants, made a written

application to defendant, a corporation of the State of Missouri, for a loan of $2000, to be secured upon real estate in the city of Duluth, Minnesota, and among the conditions in the said application was the following:

"In consideration of the above premises, I agree to execute and deliver to the said company ten promissory notes, each of the sum of $360, payable in monthly instalments of $30, commencing at date of signing contract. The said notes aver principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements. The contract hereafter to be entered into, if my application shall be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing in case of my death before payment of any unpaid instalments, a release of unpaid portion of debt, if I shall have promptly paid previous instalments and kept other conditions. As part of foregoing condition I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual $3 fee therefor, and to pay all fees for recording deed of trust or mortgage."

The bill further alleged that thereupon Krumseig passed the medical examination required, paid the fee demanded, and complainants then executed ten certain promissory notes, each for the sum of $360, dated September 5, 1890, payable in monthly instalments of $30, with interest at ten per cent after due, forty-one of which instalments, amounting to $1230, have been paid; on the same day, in order to secure these notes, they executed and delivered to the defendant a mortgage on the premises, with the usual covenants of warranty and defeasance, reciting the indebtedness of $3600, in manner and form aforesaid, and containing the following clause:

"And it is further understood and agreed by and between the said parties of the first part, their executors, administrators or assigns, and the said party of the second part, the Missouri,

Kansas and Texas Trust Company, that in case the said Theodore M. Krumseig, one of the parties of the first part, should die after the execution and delivery of the said notes and this mortgage, and within ten years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly instalment that shall have become due prior to his death according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not without written consent of the party of the second part visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train, or on a steam or sailing vessel for two years."

The bill further alleged that the sole consideration for the notes and mortgage was: 1st, the sum of $1970, together with the interest thereon from date until maturity of the instalment notes; and, 2d, the clause in the mortgage last referred to, which latter was in fact an arrangement between the respondent and the Prudential Life Insurance Company of Newark, New Jersey, to save the former harmless from any loss that might occur to it in case of the death of the complainant, Theodore M. Krumseig, during the term covered by the mortgage. It was also alleged that the defendant company had not complied with the laws of the State of Minnesota governing life insurance companies, and that the contract was therefore void. The bill prayed that the mortgage be cancelled of record and the remaining notes should be delivered up to them.

The answer denied that the contract was usurious, and alleged that the sum of $1970, received by complainants with the legal interest thereon and the cost of the guaranty of defendant to cancel the loan in case of the death of Theodore M. Krumseig during the continuance of the contract, consti-

tuted a full and ample consideration for the notes and mortgage in question, and that the same was so understood and agreed to by complainants at the time of the execution of the contract.

The Circuit Court did not consider it necessary to pass upon the question whether the contract was one of life insurance and hence void, for the admitted fact that the defendant company had not complied with the laws of Minnesota respecting life insurance companies; but regarded the contract as one for the security and payment of borrowed money, and, under the facts, as usurious and void under the statute of Minnesota; and granted the relief prayed for in the bill. 71 Fed. Rep. 350.

The Circuit Court of Appeals affirmed the decree of the Circuit Court. Two of the judges concurred in holding that the contract was usurious, and that the complainants were therefore entitled to the relief prayed for. One of the two judges so holding construed the contract as one of life insurance, and hence also void under the Minnesota laws. The third judge, while apparently concurring in the view that the contract was usurious, thought that the complainants were not entitled to a remedy for a reason which we shall presently consider. 40 U. S. App. 620.

Usury is, of course, merely a statutory offence, and Federal courts in dealing with such a question must look to the laws of the State where the transaction took place, and follow the construction put upon such laws by the state courts. *De Wolf* v. *Johnson*, 10 Wheat. 367; *Scudder* v. *Union National Bank*, 91 U. S. 406.

Section 2212, General Statutes of Minnesota of 1894, provides that upon the loan of money any charge above ten per cent shall be usurious; and section 2217 provides that "whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be cancelled and given up."

As was said in *De Wolf* v. *Johnson*, above cited, it does not,

in general, comport with a negotiation for a loan of money that anything should enter into the views of the parties, but money, or those substitutes which, from their approximation to money, circulate with corresponding, if not equal, facility. Still, however, like every other case, it is open to explanation, and the question always is whether it was or was not a subterfuge to evade the laws against usury. The books contain many cases where artful contrivances have been resorted to, whereby the lender is to receive some other advantage or thing of value beyond the repayment of the loan with legal interest. Sometimes the agreement has taken the form of the purchase of an annuity. More frequently there is a collateral agreement whereby the borrower is to purchase an article of property and to pay therefor more than its intrinsic value. It has been frequently held that to constitute usury, where the contract is fair on its face, there must be an intention knowingly to contract for or to take usurious interest, but mere ignorance of the law will not protect a party from the penalties of usury. *Lloyd* v. *Scott*, 4 Pet. 205.

The precise character of the contract between the present parties is not clear. It has some of the features of a loan of money; in other respects it resembles a contract of life insurance. But our examination of its various provisions and of their legal import has led us to accept the conclusion of courts below, that the scheme embodied in the application, notes and mortgage was merely a colorable device to cover usury. The Supreme Court of Minnesota has more than once had occasion to consider this very question. In the case of *Missouri, Kansas & Texas Trust Co.* v. *McLachlan*, 59 Minn. 468, that court said:

"The peculiar and unusual provisions of this contract themselves constitute intrinsic evidence sufficient to justify the finding of the existence of every essential element of usury, viz., that there was a loan; that the money was to be returned at all events, and that more than lawful interest was stipulated to be paid for the use of it. The only one of these which could be seriously claimed to be lacking was that the money was not to be paid at all events, but only upon a contingency,

to wit, the continuance of the life of McLachlan; but the facts warrant the inference that this contingency was not *bona fide*, but was itself a mere contrivance to cover usury. The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury."

Similar views were expressed in the subsequent case of *Matthews* v. *Missouri, Kansas & Texas Trust Co.*, 72 N. W. Rep. 121, where the Supreme Court of Minnesota again reached the conclusion that the notes and mortgage, forming a contract between the same trust company and one Matthews, were usurious and void.

The next question for our consideration is one not free from difficulty. Can a borrower of money upon usurious interest successfully seek the aid of a court of equity in cancelling the debt without making an offer to repay the loan with lawful interest?

Undoubtedly the general rule is that courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. *Tiffany* v. *Boatman's Institution*, 18 Wall. 375.

But what, in such a case, is held to be the law by the courts of the State of Minnesota? Under the statutory provision already cited, that whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, security or evidence of debt has been taken or received in violation of the provisions of this act the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be cancelled and given up, the Supreme Court of Minnesota has repeatedly held that a plaintiff suing to cancel a Minnesota contract for usury need not offer to repay the money loaned. *Scott* v. *Austin*, 36 Minn. 460;

*Exley* v. *Berryhill*, 37 Minn. 182; *Matthews* v. *Missouri, Kansas & Texas Trust Co.*, 72 N. W. Rep. 121.

Under statutes providing that, in cases of usury, the borrower is entitled to relief without being required to pay any part of the usurious debt or interest as a condition thereof, it has been held by the courts of New York and of Arkansas that courts of equity are constrained by the statutes, and must grant the relief provided for therein without applying the general rule that a bill or other proceeding in equity, to set aside or affect a usurious contract, cannot be maintained without paying or offering to pay the amount actually owed. *Williams* v. *Fitzhugh*, 37 N. Y. 444; *Lowe* v. *Loomis*, 53 Ark. 454.

But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.

We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the State. It seems to be conceded, or, if not conceded, it is plainly evident, that if the cause had remained in the state court where it was originally brought, the complainant would have been entitled, under the public policy of the State of Minnesota, manifested by its statutes as construed by its courts, to have this usurious contract cancelled and surrendered without tendering payment of the whole or any part of the original indebtedness. The defendant company could not, by removing the case to the Federal court, on the ground that it was a citizen of another State, deprive the complainants of such a substantive right. With the policy of the state

legislation the Federal courts have nothing to do. If the States, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision.

In *Clark et al.* v. *Smith*, 13 Pet. 195, it was said that "where the legislature declares certain instruments illegal and void, as the British annuity act does; or as the gaming acts do; there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature. . . . The state legislatures have, certainly, no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts. . . . The undoubted truth is that when investigating and decreeing on titles in this country we must deal with them in practice as we find them and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and to the character of the equities involved in the controversy; so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery."

The question in *Brine* v. *Insurance Co.*, 96 U. S. 627, 633, was whether a state statute which allowed to the mortgagor twelve months to redeem, after a sale under a decree of foreclosure, and to his creditor three months after that, conferred a substantial right; and it was so held, and that such right of redemption after sale was as obligatory on the Federal courts

sitting in equity as on the state courts; and that their rules of practice must be made to conform to the law of the State so far as may be necessary to give full effect to the right. The opinion of the court was delivered by Mr. Justice Miller, who said:

"It is denied that these statutes [giving the right to redeem] are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the Circuit Courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale on the rights acquired by the purchaser and those of the mortgagor and his subsequent grantees are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will or by judicial proceedings, are subject to, and may be governed by, the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract. And that all the laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned

are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form." See also to the same effect the case of *Holland* v. *Challen*, 110 U. S. 15.

Of course, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal. Nor has it been found necessary to consider whether the agreement between these parties was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly

*Affirmed.*